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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TOM MCGREGOR, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioner,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N.A., and EDWARD HERBERT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES JERRY WOOD
JAMES T. SASSER
WOOD & PARNELL, P.A.
P.O. Box 4189
641 Lawrence Street
Montgomery, Alabama 36103
(205) 832-4202

Counsel of Record for Petitioner Tom McGregor as Trustee in Bankruptcy for Parsons Steel Industries, Inc.

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Is the *Younger* doctrine of abstention applicable only when the state court action to be enjoined involves an important government interest of the state?

2. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, to enjoin a pending state court proceeding which considered issues which were not, but arguably could have been, raised in an earlier federal action?

3. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, to enjoin a pending state court proceeding in the absence of a showing of entitlement to an injunction under general equitable principles?

4. Is a litigant bound by a judgment to which he is not a party where the parties to that judgment had no authority to represent him?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Eleventh Circuit is reported at 825 F.2d 1475 and appears as Appendix A hereto; the opinion of the trial court, the United States District Court for the Middle District of Alabama, is unreported and appears as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 21, 1987. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution Of The United States, Amendment V

No person shall be ... deprived of life, liberty, or property, without due process of law;...

Anti-Injunction Act, 28 U.S.C. §2283

A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.

STATEMENT OF THE CASE

This is the second time this case has come before this Court.[1]

On February 15, 1979, Parsons Steel, Inc., (hereinafter "Parsons-Mobile") its wholly owned subsidiary, Parsons Steel Industries, Inc., (hereinafter "Parsons-Montgomery") and its shareholders, Jim D. Parsons and Melba L. Parsons (hereinafter collectively referred to as "Parsons") filed an action in the Circuit Court for Montgomery County, Alabama, against First Alabama Bank of Montgomery, N.A. (hereinafter "Bank"), its loan officer, Edward Herbert (hereinafter "Herbert"), Michael Orange (hereinafter "Orange"), and OSI, Inc., a corporation owned by Orange, Parsons Steel Industries, Inc., v. First Alabama Bank of Montgomery, N.A. Civil Action No. CV-79-179-G, (hereinafter "State Action"). The State Ac-

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[1] This Court granted a Petition for a Writ of Certiorari filed jointly on behalf of Parsons Steel, Inc., Jim and Melba Parsons and A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc. The Court reversed and remanded the case to the Eleventh Circuit Court of Appeals with instructions. *Parsons Steel Inc., v. First Alabama Bank,* 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986).

tion alleged that loans made to Parsons Steel Industries, Inc. by Bank were forced into default and foreclosed through the actions of Bank, Herbert, Orange and OSI, Inc. The State Action alleged against Bank false representations beginning in January and continuing through December, 1978, breach of fiduciary duty, conversion, and violation of the Uniform Commercial Code in the sale of repossessed collateral. Additional claims including fraud and conversion were made against Orange and OSI.

On April 5, 1979, Parsons Steel Industries, Inc. was adjudicated an involuntary bankrupt. *In Re: Parsons Steel Industries, Inc., a Bankrupt,* Bankruptcy Number 79-173-N. A. Pope Gordon was appointed Trustee.[2] The Trustee eventually succeeded to Parsons Steel Industries' interest in the State Action on motion of Bank.

On May 30, 1979, Parsons-Mobile and Parsons filed a second action against Bank in federal court, *Parsons Steel, Inc., v. First Alabama Bank of Montgomery, N.A.,* Civil Action No. 79-259-N (M.D. Ala. 1981) (hereinafter "Federal Action". Parsons-Montgomery was not a Plaintiff in that lawsuit and neither Herbert, Orange, nor OSI were Defendants. No damages were sought on behalf of Parsons-Montgomery. Parsons-Mobile and Parsons had no authority to file suit on behalf of Parsons-Montgomery since that corporation had been adjudicated a bankrupt and a Trustee appointed.

The Federal Action alleged only that Bank had conditioned an extension of credit upon a requirement of a change in management and ownership in violation of the Bank Holding

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[2] The Trustee of this Estate was appointed under the former 11 U.S.C. §1, et seq. (Bankruptcy Act of 1898) in that the debtor was adjudicated bankrupt prior to October 1, 1979, the effective date of the "new" Bankruptcy Code (11 U.S.C. §101, et seq.). Since that time A. Pope Gordon has been appointed as Bankruptcy Judge for the Middle District of Alabama and his successor as Trustee is Tom McGregor.

Company Act (hereinafter "BHCA") 12 U.S.C. §1972. Bank contended throughout the Federal Action that Parsons-Mobile and Parsons had no standing to bring that action since the damages sought were solely on behalf of Parsons-Montgomery. The district court repeatedly rejected that contention. Bank did not, however, seek to have the Trustee joined as a party to the Federal Action. The district court ordered the issue of liability tried separate from the issue of damages, and after a jury verdict in Plaintiff's favor, Bank's motion for judgment notwithstanding the verdict was granted. The United States Court of Appeals for the Eleventh Circuit affirmed holding that the facts alleged did not constitute a tying arrangement prohibited by the BHCA. *Parsons Steel, Inc. v. First Alabama Bank,* 679 F.2d 242 (11th Cir. 1982).

Bank plead the federal judgment in the State Action and presented its res judicata defense by motion for summary judgment. That motion was denied. The judge assigned to the case later recused himself and Bank presented its res judicata defense by motion to a second state court judge who also ruled that the federal judgment did not bar the State Action.

Beginning January 31, 1983, the State Action was tried for nine days. Bank and Herbert presented evidence in support of numerous affirmative defenses including waiver, consent, estoppel and res judicata. The jury returned verdicts in favor of Trustee in the amount of $2,000,000.00, in favor of Parsons-Mobile in the amount of $1.00 and in favor of the Parsons in the amount of $2,000,000.00. The trial court entered a final judgment on the jury verdict. Bank moved for judgment notwithstanding the verdict and for a new trial.

Prior to a decision on their post-trial motions Bank and Herbert filed this action in federal district court seeking to enjoin Petitioners from collecting the judgment entered in the State Action. Bank's request for injunctive relief was premised on the relitigation exception to the Anti-Injunction Act, 28

U.S.C. §2283, and its contention - previously rejected by the state court - that the judgment in the Federal Action precluded the State Action.

The district court in an unprecedented decision entered judgment in favor of Bank and enjoined Petitioner from further prosecution of the State Action. The district court made no finding that the injunction was necessary to "protect or effectuate" its prior judgment but instead based the injunction solely on its conclusion that the Federal Action barred the State Action although clearly recognizing the two actions involved different causes of action. The district court made no finding that Trustee had been "virtually represented" by the parties to the Federal Action.

The United States Court of Appeals for the Eleventh Circuit affirmed. *First Alabama Bank v. Parsons Steel,* 747 F.2d 1367 (11th Cir. 1984). The majority held that the Anti-Injunction Act, 22 U.S.C. §2283 was an implied exception to the Federal Full Faith and Credit Act, 28 U.S.C. §1738, so that the district court was not required to give full faith and credit to the state court's determination that the judgment in the Federal Action did not preclude the State Action. The majority further held that it was within the district court's discretion to enjoin the litigation of issues which were not but arguably "could have been" litigated in the Federal Action even though Bank awaited a jury verdict on the merits in state court before seeking the injunction. 747 F.2d at 1377. The majority held that the Federal Action plaintiffs were the virtual representatives of Trustee as to his fraud claim but remanded to the district court to determine whether virtual representation existed as to Trustee's UCC claim. *Id.* at 1379. It is critical to note that neither court below found that the Plaintiffs in the Federal Action had authority to represent the Trustee.

In a vigorous dissent, Judge James C. Hill reasoned that the Anti-Injunction Act did not implicitly amend the Federal Full Faith and Credit Act because the two acts can be construed harmoniously. For that reason the district court was required to give full faith and credit to the state court's determination that res judicata did not apply. Judge Hill further opined that the district court erred in granting the injunction because the State Action and Federal Action involved "different parties and, arguably, different causes of action" so that an injunction was not necessary to "protect or effectuate" the earlier federal judgment. In addition, Bank awaited a judgment on the merits in state court before requesting an injunction which further "complicates the relations between state and federal courts." 747 F.2d at 1382.

A Joint Petition for Certiorari filed on behalf of Parsons and the Trustee was granted by this court. In a 9-0 decision, this court reversed the decision of the Eleventh Circuit *Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A.*, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986). In rejecting the Court of Appeal's analysis of the effect of the relitigation exception to the Anti-Injunction Act on the Full Faith and Credit Statute, this court ruled that the possible preclusive effect under Alabama law of the state court judgment should have been considered. This court noted that unlike the several cases in *Toucey v. New York Life Insurance Company,* 314 U.S. 118, 62 S.Ct. 639, 86 L.Ed. 100 (1941), the Bank did not seek an injunction against relitigation in state court until such time as an adverse jury verdict in state court had been rendered against the Bank and the res judicata issue had been decided against it. This court further noted that the case was similar to *Atlantic Coast Line Rail Way v. Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234, (1970), which held that the various exceptions to the Anti-Injunction Act did not permit a federal court to enjoin state proceedings more threatening to federal jurisdiction than the circumstances in this case. This Court in remanding the case stated that the district court was in the best posi-

tion to determine and apply Alabama preclusion law in the first instance and if the district court found that the state court judgment was not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, that the propriety of the federal court injunction should be determined based upon the general principles of equity, comity and federalism as discussed in *Mitchum v. Foster,* 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).[3]

In accordance with the Supreme Court's decision, the Court of Appeals issued its mandate reversing the district court judgment and remanded for further proceedings in conformity with the Supreme Court opinion. *First Alabama Bank of Montgomery v. Parsons Steel, Inc.,* 785 F.2d 929 (11th Cir. 1986). On remand the district court found that Alabama law did not give preclusive effect to the state court's determination of the res judicata issue because there was no final judgment in that action and that an injunction was proper under principles of equity, comity and federalism. It therefore ordered that its injunction continue in force.

The Court of Appeals affirmed. Although acknowledging that there is no Alabama law on the question of whether a jury verdict is considered a final judgment for preclusion purposes when it is rendered nonappealable by the pendency of post-trial motions, the appeals court held that the district court did not err

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[3] This Court was able to resolve the case at that time on the basis that the Anti-Injunction Act was not an implied exception to the Full Faith and Credit Act. Therefore it did not address the issues, raised by Petitioners, of whether the relitigation exception to the Anti-Injunction Act is intended to allow injunctions in situations where a later state action involved claims that could have been litigated, but weren't actually litigated in the prior federal action or whether the Trustee, not a party to the first federal action, was nevertheless bound under res judicata by the judgment of the District Court in that action. *Parsons Steel v. First Alabama,* 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877, 885 (1986) Fn.4.

in finding that there was no final judgment for preclusion purposes under Alabama law. The Court of Appeals further held that the *Younger* doctrine as expressed in *Mitchum v. Foster,* 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) is not applicable to the facts of this case because the state court action enjoined by the district court does not implicate any important government interest of the State of Alabama. The Court of Appeals held that *Atlantic Coast Line* was distinguishable from the case at bar in that the issue of whether res judicata barred relitigation of issues that could have been raised in the original action was not presented in *Atlantic Coast Line* and that the present case does not involve an improper attempt to seek federal appellate review of a state court decision. (Appendix A, Pgs. A-9, A-15-17). Lastly the Court of Appeals clung to the position that the Trustee was bound by the prior federal action under res judicata principles because it had determined previously that the Trustee was in privity with the parties in the Federal Action. (Appendix A, Pg. A-17). The Court of Appeals opined that a district court has discretion to determine whether federal interference with state proceedings is warranted pursuant to the relitigation exception to the Anti-Injunction Act and within that discretion, a district court can go either way and not be reversed. (Appendix A, Pg. A-19).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Decision Raises Questions Of Federal-State Relations Of Critical Importance Which Must Be Settled By This Court.

There can be no greater intrusion into a state proceeding that what has occurred in this case. The district court's injunction is premised on the conclusion that an earlier federal judgment barred a pending state proceeding. The Bank's request for injunctive relief came only after a nine-day jury trial in state court trying a variety of state law issues wherein a jury verdict on the merits was rendered against the Bank.

This Court determined in *Parsons Steel v. First Alabama Bank,* 474 U.S. 518, 88 L.Ed.2d 877, 106 S. Ct. 768 (1986) that the Court of Appeals (and the District Court) erred in refusing to consider the possible preclusive effect under Alabama law of the state court judgment, noting that the Full Faith and Credit Act requires federal courts give the state judgment the same preclusive effect it would have had in another court of the same state. 88 L.Ed.2d at 884. This court further opined that should the state court judgment not be preclusive under Alabama law that the general principles of equity, comity and federalism as discussed in *Mitchum v. Foster,* 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. 2151 (1972) should be followed.

A. The Court of Appeal's decision erroneously holds that the *Younger* doctrine is only applicable when the state court action to be enjoined invokes an important government interest of the state.

Those principles, as noted in *Mitchum* were canvessed at length in the context of state criminal prosecutions in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Under *Younger,* a federal court should abstain from enjoining an ongoing state criminal prosecution absent a showing of bad faith prosecution or harassment or a showing that the challenged

statute is flagrantly or patently violative of express constitutional prohibitions, *Younger* 401 U.S. at 53-54, 91 S.Ct. at 754-55, 27 L.Ed.2d at 680-81. The district court went to great lengths to make the instant case fall within the *Younger* standards. (Appendix B, Pgs. B-37-48). However, the Court of Appeals held that it was not necessary for the district court to determine that the Petitioner's actions amounted to bad faith and harassment because *Younger* was not applicable to this case, (Appendix A., Pg. A-11). The Court of Appeals held that before *Younger* abstention is appropriate the threshold question of whether the state action enjoined by the district court invokes an important government interest of the state must be answered in the affirmative. (Appendix A, Pg. A-12). The Court of Appeals held that the state court action involved in this case was merely a private action between private parties, and the state of Alabama had no interest beyond "its interest as adjudicator of wholly private disputes "and therefore the *Younger* doctrine did not require that the district court abstain from issuing the injunction against further state court proceedings. (Appendix A, Pg. A-13).

This Court should grant certiorari to consider whether *Younger* abstention is appropriate only where important government interests of the state are involved and whether the administration of a state's judicial system is such an important government interest so as to invoke *Younger* abstention.

B. The Court of Appeal's decision violates this Court's decision in *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* by expanding exceptions to the Anti-Injunction Act.

The Anti-Injunction Act, 28 U.S.C. §2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The most important decision of this Court interpreting the Anti-Injunction Act is *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). This Court noted in *Parsons Steel* the remarkable similarity between the case at bar and *Atlantic Coast Line* which held that the various exceptions to the Anti-Injunction Act did not permit a federal court to enjoin state proceedings in circumstances more threatening to federal jurisdiction than the circumstances of this case. 88 L.Ed.2d at 884. However, the Court of Appeals attempted to distinguish *Atlantic Coast Line* from the case at bar in two respects in order to find that the federal injunction was proper. (Appendix A, Pgs. A-16-18). The Court of Appeal's analysis is faulty because of the following reasons:

1. The Court of Appeals found that the issue of whether res judicata barred relitigation of issues that could have been raised in the original federal action was not presented in *Atlantic Coast Line.* In the present case the Court of Appeals affirmed the district court's finding that the issues raised in the state court proceedings should have been raised as pendent claims in the BHCA action and therefore were barred under res judicata principles. *Parsons Steel v. First Alabama Bank,* 747 F.2d 1374, 1379. This distinguishment of the cases is based on what Petitioners contend was an erroneous decision by the District and Appeals Court that the issues raised in the state court proceeding should have been raised as pendent claims in the BHCA action and that the Bank "made a strong and unequivocal showing of relitigation". See *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.,* 708 F.2d 582, 585 (11th Cir. 1983). The Court of Appeals further cited its decision of *Woods Exploration & Producing Company v. Aluminum Company of America,* 438 F.2d 1286, 1312 (5th Cir. 1971) cert. denied 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972) holding that the relitigation exception is applicable to authorize an injunction any time the state proceeding is precluded under the doctrine of res judicata.

Woods Exploration marked the first time a court required no showing that the injunction was necessary to "protect or effectuate" a prior federal judgment but instead approved an injunction of issues which were not but "could have been" litigated in the prior federal action. The expansion of the relitigation exception in *Woods Exploration* is arguably minor since the federal judgment had been in a federal anti-trust action and the state proceeding enjoined was a state anti-trust action. The issues in both cases although arising under different laws were substantively identical.

The United States Court of Appeals for the Seventh Circuit relying on *Woods Exploration* further expanded the relitigation exception in *Harper Plastics, Inc. v. Amoco Chemical Corporation,* 657 F.2d 939 (7th Cir. 1981). In *Harper* the state court defendant had previously obtained a federal judgment that its actions relating to distribution of plastic raw materials did not violate federal anti-trust laws. The plaintiff then filed a complaint in state court alleging the same facts but basing recovery on breach of contract under state law. The Seventh Circuit, citing *Woods,* held that the state law contract claim could have been joined with the earlier federal claim so that it was now within the district court's discretion to enjoin the state action.

In this case the lower courts, relying on *Woods* and *Harper,* have stretched the relitigation exception to the point of destroying the independent nature of state courts. The district court made no finding that its injunction was necessary to "protect or effectuate" its prior judgment and specifically recognized that the federal and state action involved different causes of action. In addition the injunction extends to the Trustee whose only opportunity to fully and fairly adjudicate his claims came in state court.

Although *Woods* and *Harper* represent injunctions of doubtful necessity to "protect or effectuate" a prior federal judgment the injunctions in those cases were much less intrusive into state

court function than the injunction in this case because they were issued in the early stages of the state court proceedings. Neither of the courts in those cases sat in direct review of a state court by resolving an issue which that court had previously resolved nor did those courts enjoin litigants who were not parties to the federal judgment and who had had no prior opportunity to litigate their claims.

2. The Court of Appeals also attempted to distinguish *Atlantic Coast Line* by finding that the case at bar did not involve an improper attempt to seek federal appellate review of a state court decision because the state action was not final at the time the district court issued its injunction in this case. (Appendix A, Pg. 16). The Petitioners contend that the Court of Appeals finding that the state court jury verdict on the merits was not a final judgment for preclusion purposes under Alabama state law was erroneous. This finding is premised on the fact that the pendency of post trial motions rendered the action not final for purposes of appeal and that in order for a state court judgment to be final for preclusion purposes it must also be final for purposes of appeal. (Appendix A., Pg. 8). However, even if the Court of Appeals was correct, this Court must look at the reason the state judgment was not final for appeal purposes. It was because Bank filed the post-trial motions for new trial and judgment notwithstanding the verdict. After filing those motions, the Bank filed its action in federal court seeking to enjoin further state proceedings. It is obvious that the Bank was displeased with the results in state court and specifically the state court's rulings concerning the res judicata effect of the federal BHCA action on the state action. The filing of the action for injunctive relief was a mere ruse to actually seek federal appellate review of a state court decision, an action strictly proscribed by this Court in *Atlantic Coast Line,* 398 U.S. at 293.

The general principles of comity, equity and federalism should bar the issuance of such an injunction against this Petitioner. As noted by this Court in *Parsons*:

> "In each of the several cases involved in *Toucey,* the prevailing party in the federal action sought an injunction against relitigation in state court as soon as the opposing party commenced the state action and before there was any resolution of the res judicata issue by the state court. In the instant case, on the other hand, Respondents (Bank) chose to fight out the res judicata issue in state court first and only after losing there did they return to federal court for another try.

89 L.Ed.2d at 884.

However the Court of Appeals found that this Court did not question the earlier affirmance of the District Court's finding that the Bank was excused for failing to seek an injunction at an earlier point in the state proceedings. (Appendix A, Pg. A-21, n.8).

Petitioner has contended throughout this case that the Bank waited too late to file an action for injunctive relief in federal court. This contention is supported by the case of *Rosado v. General Electric Circuit Breakers,* 805 F.2d 1085 (1st Cir. 1987). The Bank has continually argued that the Trustee was in privity with the other Plaintiffs in the federal action and that the state action involved improper claim splitting and therefore the state action should be barred by res judicata. *Rosado* holds that a Defendant consents or acquiesces to claim splitting when, while two actions on the parts of the same claim are pending, he fails to object to the claim splitting. If after judgment enters on one of the two, the Defendant then moves to dismiss the second on res judicata grounds, the motion should be denied. The purpose behind the principles of res judicata is to protect a Defendant from harassment of multiple actions and a Defendant who fails to timely complain of claim splitting waives that benefit. This holding is in accord with the Restatement (Second) of Judgments §26 comment (a) illustration 1. *Rosado* supports the Petitioner's contention that the Bank waived its right to injunc-

tive relief by waiting too long. Therefore, the only reasonable and equitable decision would have been to deny the Bank's request for injunctive relief and allow the challenge to the correctness of the state court's determination as to the conclusive effect of the federal judgment to be pursued by way of appeal through the state court system and certiorari from this court.

The seriousness of federal judicial interference with state civil functions has long been recognized by this court. This court has consistently held that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603, 95 S.Ct. 1200, 43 L.Ed.2d 482, 492 reh. denied, 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed.2d 463 (1975).

II. The Decision Below Deprived The Trustee Of A Full And Fair Opportunity To Litigate His Claims In Violation Of The Requirements Of Due Process.

At a minimum due process of law requires that a litigant be afforded the opportunity to present evidence and argument in support of his claims. *Blonder-Tongue Laboratories, Inc. v. University of Illinois,* 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788, 799 (1971). Consequently, one is not bound by a judgment in litigation in which he is not designated as a party or to which he has not been made a party unless he is in fact adequately represented by parties who are present with the authority to represent him. *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 114, 85 L.Ed.2d 22 (1940).

In *Montana v. United States,* 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1978), this Court considered the circumstances under which a non-party can be bound by prior litigation. In that case a contractor on a federal project filed an action in Montana state court alleging that a gross receipts tax on public, but not private construction projects, violated the United States

Constitution by discriminating against the federal government and companies which dealt with it. The tax was ultimately upheld as constitutional by the Supreme Court of Montana. Subsequently, the United States filed an action in United States District Court and a three judge panel held that the gross receipts tax violated the supremacy clause. On appeal this Court reversed and held that the United States, although not a party to the state court litigation, was bound by it because the United States had a sufficient "laboring oar" in the conduct of that litigation. In reaching that decision this Court noted the undisputed evidence that the United States required the state court lawsuit to be filed, reviewed and approved the complaint, paid attorneys' fees and costs, directed the appeal and filed an amicus brief. By directing the state court litigation the United States had a full and adequate opportunity to litigate the issues and was therefore bound by that court's decision.

In the instant case the courts below did not, nor could they, find that the Trustee had a "laboring oar" in the Federal Action. The Trustee played no role in the decision to file that action, did not participate in any manner in that action and did not contribute toward attorneys' fees or expenses.

In the absence of virtual representation the Courts below found that the Trustee was the Federal Action Plantiff's "privy" and that he could have intervened in the Federal Action.[4] The parties to the federal action had no authority to represent - and did not attempt to represent - Parsons-Montgomery. These parties sought only to recover damages they suffered separate and distinct from Parsons-Montgomery. Although the Bank on several occasions argued that the Federal Action plaintiffs had suffered no damages separate from the bankrupt corporation and therefore had no standing to bring

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[4] The use of the term "privy" in the context of preclusion of non-parties "has been criticized as conclusory and analytically unsound." *Montana v. United States,* 440 U.S. at 154, n.5.

that action the district court rejected that argument. Since no claims were made on behalf of the bankrupt corporation in the federal action there was no reason for the Trustee to intervene.

The Court of appeals however placed great emphasis on the Trustee's knowledge of the Federal Action and his choice not to intervene in finding that the Trustee was in privity with the parties to the Federal Action. Trustee contends that his failure to intervene should not have been fatal. In *Atlantic Coast Lines* this Court held that while "the *Railroad* could probably have based its federal case on the pendent state law claims as well, it was free to refrain from doing so and leave the state law questions and related issue concerning preclusion of state remedies by federal law to the state courts." 398 U.S. at 295. Likewise, the Trustee should not have had to intervene in the Federal Action to protect the bankrupt estate's interests.

Writing for a unanimous court in *Blonder-Tongue v. University of Illinois,* Justice White stated:

> Some litigants - those who never appeared in a prior action - may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

402 U.S. at 329. The Trustee in this case has been denied due process of law. His only chance to present evidence and argument on his claims occurred in the State Action. The district court's unprecedented injunction denying him the right to proceed to collect the damages awarded him in that action denies due process of law. This Court should grant certiorari to protect the Trustee's only opportunity to fully and fairly litigate his claim.

III. This Court Should Grant Certiorari To Resolve A Conflict Between The Circuit Courts Of Appeals Created By The Decision Below.

As noted in the previous Petition for Certiorari the Court of Appeal's opinion represents the first time a court has found virtual representation in the absence of a finding that the party to be estopped expressly or impliedly authorized a party to represent him in prior litigation. That decision creates a conflict among the circuit courts of appeals which this Court should resolve.

In *General Foods Corporation v. Massachusetts Department of Public Health*, 648 F.2d 784 (1st Cir. 1981) the Court of Appeals for the First Circuit held that in order to be virtually represented a party must expressly or impliedly grant another party authority to represent him.[5] In that case two food companies, General Foods Corporation and Rich-SeaPak Corporation brought an action against the Massachusetts Department of Health challenging the constitutionality of state regulation of food labeling. The defendant claimed that an earlier state court judgment in an action brought by two trade associations precluded that action. The district court dismissed the federal action on res judicata grounds. On appeal the court of appeals held that because General Foods had been a member of both trade associations and had contributed $2,500.00 toward expenses of the earlier litigation it had expressly or impliedly authorized the trade association to represent it and for that reason was bound by the prior judgment. The court reversed however as to Rich-SeaPak Corporation because that corporation had neither been a member of either trade association nor in any manner directed the prior litigation.[6]

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[5] This definition of virtual representation accords with the Restatement of the Law of Judgments §41(1)(b).

[6] The United States Court of Appeals for the Second Circuit reached a similar conclusion in *Expert Electric Company v. Levine*, 545 F.2d 1277 (2nd Cir. 1977).

Similarly in *Humphreys v. Tann,* 487 F.2d 666 (6th Cir. 1973), cert. denied, 416 U.S. 956, 94 S.Ct. 1970, 40 L.Ed.2d 307 (1974), the Sixth Circuit Court of Appeals permitted a plaintiff to sue the owner of an airplane involved in a mid-air collision even though an earlier suit had relieved the owner of liability. Even though the attorney for the plaintiff had participated in pretrial discovery and litigation conferences for the first trial the Court of Appeals for the Sixth Circuit permitted the plaintiff to have a separate day in court to try his theory of liability.

In *Del Mar Avionics v. Quinton Instruments Company,* 645 F.2d 832 (9th Cir. 1981) the Ninth Circuit Court of Appeals held that an instrument manufacturer was barred from relitigating a patent infringement issue which had been resolved in an earlier action against the manufacturer's distributor. Since the manufacturer had authorized its distributor to represent it in those issues and had directed the prior litigation it had had its opportunity to fully and adequately litigate those issues.

Each of these cases includes as an element of the definition of "virtual representation" the requirement that a party to the prior litigation act with implied or expressed authority of the party now sought to be bound. In the instant case the Eleventh Circuit Court of Appeals has eliminated that element and in doing so has created a new definition of "virtual representation". Because its new definition is in conflict with prior decisions of the First, Second, Sixth and Ninth Circuit Courts of Appeal this Court should grant certiorari to resolve that conflict.

CONCLUSION

The issues presented by this case again strike at the heart of our federal system by expanding the relitigation exception to the Anti-Injunction Act and by allowing a federal court to sit in direct review of a state court decision. The courts below have upset the balance between our co-existing independent court systems. When friction arises between these two systems this Court must resolve the conflict. The Petition for Certiorari should therefore be granted.

Respectfully Submitted,

JAMES JERRY WOOD
JAMES T. SASSER

Attorneys for Tom McGregor,
Trustee in Bankruptcy

Of Counsel:
WOOD & PARNELL, P.A.
Post Office Box 4189
Montgomery, Alabama 36103-4189
(205/832-4202)

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 85-7343, 86-7506

First Alabama Bank of Montgomery, N.A.,
and Edward Herbert,
Plaintiffs-Appellees,

v.

Parsons Steel, Inc., Jim D. Parsons, Melba L. Parsons,
and Parsons Steel Industries, Inc.,
Defendants,

Tom McGregor, as Trustee in Bankruptcy for Parsons
Steel Industries, Inc.,
Defendant - Appellant.

Parsons Steel, Inc., Jim D. Parsons, Melba L. Parsons,
and Parsons Steel Industries, Inc.,
Defendants - Appellants

Tom McGregor, as Trustee in Bankruptcy for
Parsons Steel Industries, Inc.,
Defendant - Appellant.

August 21, 1987
Appeals from the United States District
Court for the Middle District of Alabama

Before HILL AND JOHNSON, Circuit Judges, and HENLEY,* Senior Circuit Judge.

JOHNSON, Circuit Judge:

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* Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

This consolidated appeal challenges the propriety of the district court's continuance of an injunction issued in favor of Appellees, First Alabama Bank ("First Alabama") and bank officer Edward Herbert against further prosecution of a state court action filed against Appellees by Appellants Parsons Steel, Inc. ("Parsons-Mobile"), Jim D. and Melba Parsons ("Parsons"), and Tom McGregor, trustee in bankruptcy of Parsons Steel Industries, Inc. of Montgomery ("Parsons-Montgomery") in the Circuit Court of Montgomery County, Alabama.[1] All Appellants challenged the district court's order continuing the injunction in force. McGregor also appeals the district court's order refusing to modify the injunction to allow him to pursue a UCC claim in state court. We affirm.

I. BACKGROUND

This case arises out of a series of bank transactions involving First Alabama and Parsons-Montgomery, a wholly owned subsidiary of Parsons-Mobile, ninety-nine percent of the stock of which is in turn owned by Parsons. This is the third time this Court has been called upon to review judgments in litigation arising out of those transactions.

In the fall of 1978, Parsons-Montgomery owed First Alabama one million dollars in secured debt. Anticipating that Parsons-Montgomery would not be able to pay this debt, Parsons and First Alabama discussed possible refinancing or sale of the business. After one attempt to sell failed, First Alabama contacted one of its customers, Michael Orange. Orange did not want to purchase the ocmpany but agreed with Parsons in December 1978 to manage the company for a fee and stock option. Orange soon resigned, and First Alabama commenced foreclosure proceedings against Parsons-Montgomery in January 1979 and sold its assets at a private sale to OSI, Inc., Orange's corporation, for the amount of the outstanding debt.

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[1] *Parsons Steel Industries, Inc. v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. CV-79-179-G.

On February 15, 1979, Parsons-Montgomery, Parsons-Mobile, and Parsons filed suit in Alabama circuit court against First Alabama, Herbert, Orange and OSI, alleging that First Alabama fraudulently forced Parsons to allow Orange to take control of Parsons-Montgomery, and eventually to obtain complete ownership of the company. Orange and OSI eventually were dismissed from the suit pursuant to a pro tanto settlement in January, 1983.

On April 5, 1979, Parsons-Montgomery was adjudicated an involuntary bankrupt. On May 30, 1979, Parsons-Mobile and Parsons filed suit in federal court against First Alabama alleging that the same actions of First Alabama that gave rise to the state lawsuit violated the Bank Holding Company Act, 12 U.S.C.A. §§1971 to 1978 ("BHCA"). Parsons-Montgomery and its trustee were not original parties to the federal action, and the trustee chose not to join the action. The trustee was made a party to the state court action pursuant to First Alabama's motion alleging that he was an indispensable party. The trustee participated in joint discovery that was designated for use in both the state and federal action.

The federal action was bifurcated and proceeded to judgment before the state action. After a jury verdict in favor of the plaintiffs, the district court entered a judgment n.o.v. for First Alabama in June 1981. This Court affirmed. *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242, 246 (11th Cir. 1982) ("Parsons I"). Appellees asserted the federal judgment as res judicata in the state action through motions to dismiss and for summary judgment which were denied by the state court. On June 11, 1982, the trustee filed an amended complaint in the state action which alleged for the first time that First Alabama's sale of the assets of Parsons-Montgomery was commercially unreasonable in violation of Article 9 of the Uniform Commercial Code ("UCC claim"). Shortly before the state trial was scheduled to begin, the state court entered a judgment in limine stating that the res judicata issue was not ap-

propriate for presentation to the jury.[2] The state trial commenced January 31, 1983. Appellees moved for directed verdict at the close of the plaintiff's case and at the close of all the evidence, asserting res judicata and collateral estoppel. Both motions were denied. The jury returned a verdict for Appellants in the amount of $4,000,001.00. On February 24, 1983, Appellees filed motions for judgment n.o.v. and a new trial asserting as one basis for judgment n.o.v. the preclusive effect of the prior federal judgment.

On March 7, 1983, Appellees filed a complaint in federal court seeking to enjoin further prosecution of the state court action on the basis of res judicata and collateral estoppel. On June 15, 1983, the district court enjoined further prosecution of the state court action by Appellants finding that the claims raised in the state court action by Appellants finding that the claims raised in the state court proceedings should have been raised in the federal proceeding and that the trustee, although not a party to the federal action, was in privity with those parties and, therefore, bound by the judgment in the prior federal action as well. At the time of issuance of that injunction, Appellees' motions for judgment n.o.v. and for a new trial were still pending in the state court action. The state court stayed the action in accordance with the injunction on July 6, 1983.

This Court affirmed the district court's decision, except with regard to the district court's determination that the trustee was precluded by the prior federal action from pursuing his UCC

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[2] The order indicated that the state court was "of the general impression that the issue of res judicata is an issue properly to be decided by the Court rather than an issue to be presented to and decided by the jury" and that "[t]his proposition would be especially true where, as in the instant case, the factual issues have been fully presented to the Court in the course of Motions to Dismiss, Motion for Summary Judgment and Motion for Reconsideration of Motion for Summary Judgment and that the facts as regards the issue of res judicata are clearly undisputed."

claim. *First Alabama Bank of Montgomery v. Parsons Steel, Inc.*, 747 F.2d 1367, 1381 (11th Cir. 1984), rev'd, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986) ("Parsons II"). The Court remanded that issue to the district court "for further fact findings to determine whether the injunction should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale." *Id.* The *Parsons II* Court held that issuance of the injunction was proper under relitigation exception to the Anti-Injunction Act,[3] which generally prohibits a federal court from enjoining state proceedings, but excepts from that prohibition, inter alia, injunctions "necessary ... to protect or effectuate its judgments." *Id.* at 1375. The Court found that the district court's independent determination as to the res judicata effect of the BHCA action was not precluded by the state court's prior determination of that issue because the relitigation exception to the Anti-Injunction Act modified the Full Faith and Credit Statute[4] so that "while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action." *Id.* at 1375-76.

The Supreme Court reversed. *Parsons Steel, Inc. v. First Alabama Bank of Montgomery*, 474 U.S. 518, 106 S.Ct. 768, 773, 88 L.Ed.2d 877 (1986) ("Parsons III"). It rejected this

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[3] The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C.A. §2283.

[4] The Full Faith and Credit Statute provides in pertinent part that "judicial proceedings ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C.A. §1738.

Court's analysis of the effect of the relitigation exception to the Anti-Injunction Act on the Full Faith and Credit Statute, finding that the two provisions could be read consistently by "limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue" and that "[o]nce the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision." *Id.* at 772. The Supreme Court thus found that this Court had erred in failing to consider the possible preclusive effect under Alabama law of the state-court judgment. *Id.* It further found that the district court was in the best position to determine and apply Alabama preclusion law in the first instance and, if the district court found that the state-court judgment was not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, "it would then be in the best position to decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism ..." *Id.* at 773.

In accordance with the Supreme Court's decision, this Court issued its mandate reversing the district court judgment and remanding for further proceedings in conformity with the Supreme Court opinion. *First Alabama Bank of Montgomery v. Parsons Steel, Inc.*, 785 F.2d 929 (11th Cir. 1986). On remand, the district court found that Alabama law did not give preclusive effect to the state court's determination of the res judicata issue because there was no final judgment in that action and that an injunction was proper under principles of equity, comity and federalism. It therefore ordered that its injunction continue in force. The district court also denied Parsons' motion requesting that the judge recuse himself. These determinations are the subject of the appeal in No. 86-7506.

By an earlier order, the district court had determined that the trustee's UCC claim arose out of pre-sale matters regarding ac-

tions of First Alabama and Orange that should have been raised in the federal action and therefore had declined to modify its injunction to allow the trustee to pursue a UCC claim on behalf of Parsons-Montgomery. That order is the subject of the appeal in No. 85-7343. Also pending before this Court is Appellants' motion to supplement the record on appeal.

II. DISCUSSION

A. Finality of State Court Determination of Res Judicata Issue

The preclusive effect of the federal action was raised in the state court action by Appellees through motions to dismiss, motions for summary judgment and motions for directed verdict, all of which were denied. The district court held that these rulings were not final judgments entitled to preclusive effect under Alabama law. The district court found that the issue was still pending before the state court in connection with Appellees' motions for judgment notwithstanding the verdict or for a new trial at the time the district court issued its injunction. Because the district court concluded that finality for purposes of appeal and for purposes of determining preclusive effect are equated under Alabama law, that court held that the pendency of these post-trial motions prevented the state determination from having a preclusive effect because an appeal could not be taken until resolution of the post-trial motions. We find no error in the district court's determination of this issue.

[1,2] The Full Faith and Credit Act requires that a federal court give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered. *Cable Holdings of Battlefield, Inc. v. Cooke,* 764 F.2d 1466, 1473 (11th Cir. 1985). Under Alabama law, res judicata and collateral estoppel principles do not apply until there is a final judgment rendered on the merits of the case. *Food Service Distributors, Inc. v. Barber,* 429 So.2d 1025, 1027 (Ala. 1983); accord, *Owen v. Miller,* 414 So.2d 889, 890-891 (Ala. 1981);

Pooley v. State, 470 So.2d 1337, 1339 (Ala.Crim.App. 1985). Denial of a motion for summary judgment is not a final judgment. *Barber,* 429 So.2d at 1027. Nor does such a denial become the law of the case: "a court may reconsider its ruling on a motion for summary judgment and may correct an erroneous ruling at any time before final judgment." *Id.* Therefore, denial of Appellees' motions for summary judgment was not a final adjudication of the preclusion issue.

There is no Alabama law on the question of whether a jury verdict is considered a final judgment for preclusion purposes when it is rendered nonappealable by the pendency of post-trial motions. It appears, however, that the district court was correct in its determination that Alabama equates finality for purposes of preclusion with appealability.[5] In *Sterling Oil of Oklahoma, Inc. v. Pack,* 291 Ala. 727, 287 So.2d 847 (1973), the Alabama Supreme Court, noting that the test was the finality of the judgment, found that it was required to give preclusive effect to a district court's grant of partial summary judgment on the issue of whether appellant was qualified to do business because the grant of summary judgment, although interlocutory, was appealable. *Id.* at 861. The Court stated:

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[5] This is the federal rule. J. Moore, 1B Moore's Federal Practice para. 0.416[3] at 519-520 (2d ed.1984) (finality for res judicata purposes is "closely related to that for appealability under the final judgment rule of 28 U.S.C. §1291"). Nonappealable interlocutory orders are not entitled to collateral estoppel or res judicata effect. *Id.* at 520. Professor Moore notes that, on analogous reasoning, post-trial motions that destroy the finality of the judgment for purposes of appeal, such as a motion for judgment n.o.v., also should destroy the preclusive effect of the judgment. Id. But see *Hubbell v. United States,* 171 U.S. 203, 210, 18 S.Ct. 828, 831, 43 L.Ed. 136 (1898) (dicta expressing doubt as to whether motion for new trial would prevent preclusive effect). The Restatement (Second) Judgments takes the opposite position: "A judgment otherwise final for purposes of the law of res judicata is not deprived of such finality by the fact that time still permits commencement of proceedings in the trial court to set aside the judgment and grant a new trial or the like; nor does the fact that a party has made such a motion render the judgment nonfinal." Restatement (Second) Judgments §13, Comment f (1980).

> We have been cited to no persuasive authority, and we have found none, on either side of this issue. We believe the appealable nature of such order - given the other prerequisites is the controlling factor; and we, therefore, hold that the principle of comity requires that we give res judicata effect to the judgment of the federal court, applying Alabama substantive law, holding on its merits that the [contract] is not void for failure ... to qualify as a foreign corporation ..., which judgment was neither revoked, amended, nor reversed on appeal. *Id.*

[3] The judgment entered pursuant to the jury verdict in the state action in this case was not final for purposes of appeal during the pendency of the judgment n.o.v. and new trial motions. See A.R.A.P. 4(a)(3); *Spina v. Causey,* 403 So.2d 199, 201 (Ala. 1981). Therefore, the district court did not err in finding that there was no final judgment for preclusion purposes under Alabama law. *Cf. Cable Holdings,* 764 F.2d at 1473 (district court erred in giving res judicata effect to state court judgment not final for purposes of appeal under Georgia law when it appeared that Georgia measured finality for res judicata purposes by same standard as finality for appeal).[6]

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[6] Appellants make several arguments as to why the judgment in the state action should be considered final. We find these arguments unpersuasive. First, Appellants argue that Alabama would consider a judgment in this posture final for other purposes, such as measuring the date from which interest would run. However, whatever may be the criteria for determining the finality of a judgment for other purposes, *Sterling* clearly indicates that appealability is the criterion under Alabama law for determining a judgment's finality for preclusion purposes. Second, Appellants point to statements of the trial judge which they argue indicate that he viewed his decision of the res judicata issue as final in the sense that he did not plan to change his mind, and they take issue with the district court's determination that the trial judge has reserved the res judicata issue for determination in connection with the motion for judgment n.o.v. Whether the trial judge in the state action intended to change his decision with regard to the res judicata issue upon reconsideration of that issue in connection

B. Considerations of Equity, Comity and Federalism

1. Younger Abstention

The Supreme Court stated that "[s]hould the District Court conclude that the state court judgment is not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, it would then be in the best position to decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism discussed in *Mitchum v. Foster,* 407 U.S. 225, 243, 92 S.Ct. 2151, 2162, 32 L.Ed.2d 705 (1972)." *Parsons III,* 106 S.Ct. at 773. In *Mitchum,* The Supreme Court held that section 1983 came within the "expressly authorized" exception contained in the Anti-Injunction Act, but noted that "[i]n so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to en-

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with Appellees' motions for judgment n.o.v. is not determinative of the question of whether the judgment was final for preclusion purposes. As discussed above, the Alabama rule is that a judgment is not final for preclusion purposes until it is appealable. Third, Appellants argue that the res judicata issue could not be raised in connection with a motion for directed verdict or for judgment n.o.v. because the only issue for consideration in connection with these motions is the sufficiency of the evidence to support the jury's verdict. Alabama courts, however, have held a directed verdict or motion for judgment n.o.v. proper on the basis of an issue of law that is appropriatefor decision by the judge rather than the jury. *E.G., Saxon v. Johnson,* 393 So.2d 1007, 1010-11 (Ala.App. 1980), cert. denied sub nom. *Ex parte Johnson,* 393 So.2d 1012 (Ala. 1981) (directed verdict should have been granted on basis of interpretation of deed, which was issue reserved for decision by judge in pretrial order). Finally, Appellants argue that Appellees' federal suit was a collateral attack on a final judgment prohibited under Alabama law. See *Williams v. First National Bank of Mobile,* 384 So.2d 89, 94 (Ala. 1980). This argument, however, assumes the existence of a final judgment in the state court action and, therefore, begs the question. The mere pendency of two suits involving the same subject matter does not create a preclusive bar until final judgment in one of them. *Logan v. O'Barr,* 122 So.2d 376, 380 (Ala. 1960). Further under Alabama law, a suit to enjoin the execution of a judgment is considered a direct, not a collateral, attack on the judgment. *Williams,* 384 So.2d at 93.

join a state court proceeding." 407 U.S. at 243, 92 S.Ct. at 2162. The *Mitchum* Court stated that "[t]hese principles, in the context of state criminal prosecutions, were canvassed at length...in *Younger v. Harris.*" *Mitchum,* 407 U.S. at 243, 92 S.Ct. at 2162 (citation omitted).

[4] The district court interpreted the Supreme Court's mandate in *Parsons III* as requiring that the district court measure the appropriateness of an injunction in this case under the standards established by *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), for enjoining state criminal prosecutions. Under *Younger,* a federal court should abstain from enjoining an ongoing state criminal proceeding absent a showing of bad faith prosecution or harassment or a showing that the challenged statute is flagrantly and patently violative of express constitution prohibitions. *Younger,* 401 U.S. at 53-54. 91 S.Ct. at 754-55; accord, *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 611, 95 S.Ct. 1200, 1211, 43 L.Ed.2d 482 (1975). Proceedings on the assumption that an injunction of the state court action in this case would be appropriate only if this case came within one of the narrow exceptions to the *Younger* doctrine, the district court found that Appellants had engaged in harassment and bad faith sufficient to justify issuance of an injunction.

We need not reach the issue of whether the district court was correct in its determination that Appellants' actions amounted to bad faith and harassment because we find that the *Younger* doctrine is not applicable on the facts of this case. As discussed above, *Younger v. Harris* dealt with the propriety of a federal injunction against ongoing state criminal proceedings. In the civil context, the comity principles embodied in the *Younger* doctrine have been held applicable when "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.,* ___ U.S. ___, ___, 107 S.Ct. 1519, 1526, 95 L.Ed.2d 1 (1987). See, e.g., id. 107 S.Ct. at 1527 (state interest in execution of state judgments); *Ohio Civil Rights Comm'n v. Dayton*

Christian Schools, Inc., ____ U.S. ____, ____, 106 S.Ct. 2718, 2723, 91 L.Ed.2d 512 (1986) (state civil rights commission action to vindicate state interest in elimination of sex discrimination); *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 434, 102 S.Ct. 2515, 2522, 73 L.Ed.2d 116 (1982) (important state interest in maintaining and assuring the professional conduct of attorneys it licenses); *Moore v. Sims*, 442 U.S. 415, 423, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994 (1979) (child custody proceedings "in aid of and closely related to criminal statutes"); *Juidice v. Vail*, 430 U.S. 327, 335-36, 97 S.Ct. 1211, 1217, 51 L.Ed.2d 376 (1977) (vital state concern in enforcement of contempt proceedings); *Trainor v. Hernandez*, 431 U.S. 434, 444, 97 S.Ct. 1911, 1918, 52 L.Ed.2d 486 (1977) (suit and accompanying writ of attachment brought by state to vindicate important state policies such as safeguarding the fiscal integrity of public assistance programs); *Huffman*, 420 U.S. at 609, 95 S.Ct. at 1210 (proceeding pursuant to state nuisance statute "in aid of and closely related to criminal statutes"). Thus, it is only civil proceedings "in which important state interests are involved" that warrant abstention under the *Younger* doctrine. *Moore*, 442 U.S. at 423 & n.8, 99 S.Ct. at 2378 & n.8 ("we do not remotely suggest that every pending proceedings between a State and a federal plaintiff justifies abstention unless one of the exceptions to *Younger* applies"); accord, *Cate v. Oldham*, 707 F.2d 1176, 1183 (11th Cir. 1983) ("Application of the *Younger* doctrine to ongoing state civil proceedings has been limited to those civil actions in aid of criminal jurisdiction or involving enforcement-type proceedings in which vital interests of the state qua state are involved.").

[5] Therefore, the initial inquiry in determining whether a federal court should abstain when asked to enjoin an ongoing state civil proceeding is whether an important governmental interest of the state is implicated by that civil action so that such an injunction would be "an offense to the State's interest ... likely to be every bit as great as it would be were this a criminal proceedings." *Juidice*, 430 U.S. at 336, 97 S.Ct. at 1217

(quoting *Huffman,* 420 U.S. at 604, 95 S.Ct. at 1208). Because the district court interpreted the Supreme Court mandate as requiring application of *Younger,* the district court did not make this threshold inquiry as to whether an important state interest was implicated in this case. We do not read the Supreme Court's mandate as dispensing with this threshold inquiry. Instead, the Supreme Court's mandate merely states, as did the opinion in *Mitchum,* that the fact an injunction may be permissible under an exception to the Anti-Injunction Act does not mean that the district court should not also consider whether such an injunction is appropriate under the principles reflected in the *Younger* doctrine.

[6] Our consideration of this threshold inquiry leads us to conclude that *Younger* abstention is not appropriate in this case because the state court action enjoined by the district court does not implicate any important government interest of the State of Alabama. The importance of a state interest may be demonstrated by the fact that the proceedings sought to be enjoined are noncriminal proceedings bearing a close relationship to criminal proceedings or by the fact the proceedings are necessary for the vindication of important state policies or the functioning of the state judicial system. *Middlesex Ethics Comm'n,* 457 U.S. at 432, 102 S.Ct. at 2521. Alabama is not a party to the action enjoined in this case, nor was that action brought to vindicate important interests of that State. Similarly, the action does not implicate the State's "important interests in administering certain aspects of [its] judicial system[]." *Pennzoil,* 107 S.Ct. at 1527. The state court action involved in this case was merely a private action between private parties in which the State of Alabama had no interest beyond "its interest as adjudicator of wholly private disputes." *Id.* at n. 12. Therefore, we find that the *Younger* doctrine did not require that the district court abstain from issuing the injunction against further state court proceedings.

2. Propriety of the Injunction

"[T]he phrase 'to protect or effectuate its judgments' authorize[s] a federal injunction of state proceedings only 'to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.' " *Parsons III,* 106 S.Ct. at 773 (quoting *Atlantic Coãst Line Railroad Company v. Locomotive Engineers,* 398 U.S. 281, 295, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970)). Further, accomodation of the state and federal interests involved when a federal court is asked to enjoin a state court proceeding has led to the requirement that the party seeking the injunction must make a "strong and unequivocal showing of relitigation." *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.,* 708 F.2d 582, 585-86 (11th Cir. 1983). In *Parsons II,* this Court found that Appellees had made the requisite showing in this case. 747 F.2d at 1375. We find no reason to alter that conclusion.

[7] Appellants assert that the district court's injunction was improper in light of the Supreme Court's decision in *Atlantic Coast Line R. Co. v. Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). We cannot agree. While the Supreme Court noted in *Parsons III* that the present action was "similar to *Atlantic Coast Line,* in which we held that the various exceptions to the Anti-Injunction Act did not permit a federal court to enjoin state proceedings in circumstances more threatening to federal jurisdiction than the circumstances of this case," Id. 106 S.Ct. at 772-73, that statement certainly was not tantamount to a holding by the Supreme Court that the injunction in this case was improper. The Supreme Court clearly did not reach the issue of the propriety of the injunction in *Parsons III.* Further, given our determination that the state court judgment in this case was not final for preclusion purposes, *Atlantic Coast Line* clearly is distinguishable from the present case.

Atlantic Coast Line involved a federal court order enjoining enforcement of a prior state injunction which prohibited

picketing by the *Brotherhood of Locomotive Engineers* ("BLE") at a switching yard known as Moncrief Yard, which was owned and operated by *Atlantic Coast Line Railroad* ("ACL"). ACL originally had sought an injunction in the federal district court, but that court had denied relief. ACL then obtained an injunction in state court. Two years after the state court had issued its injunction, the Supreme Court rendered its decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969), which considered the validity of picketing by the BLE and other unions at a location directly next to Moncrief Yard and held that the unions had a federally protected right to picket that could not be interfered with by state court injunctions. BLE filed a motion in state court to dissolve the injunction as improper under *Jacksonville Terminal,* which was denied. Instead of appealing that denial, BLE sought an injunction of enforcement of the state injunction in federal court, and the district court granted the injunction. BLE argued that the district court's injunction was proper under the Anti-Injunction Act either as necessary to protect or effectuate the district court's prior denial of an injunction of the picketing or as necessary in aid of its jurisdiction, another exception to the Anti-Injunction Act. *Atlantic Coast Line,* 398 U.S. at 283-84, 90 S.Ct. at 1741.

BLE's argument that the injunction was proper under the relitigation exception was based on its contention that the district court had determined in its original order denying ACL's request for an injunction that BLE had a federally protected right to picket Moncrief Yard that could not be interfered with by the state courts. Id. at 288, 90 S.Ct. at 1744. The Supreme Court rejected that interpretation of the district court's original judgment, concluding instead that what BLE sought to protect by the federal court injunction was not the district court's original judgment but the "amplification" of that judgment provided by the intervening decision in *Jacksonville Terminal. Id.* at 293, 90 S.Ct. at 1746. The Court stated

that "[s]uch a modification of an earlier order through an opinion in another case is not a 'judgment' that can properly be protected by an injunction against state court proceedings." *Id.* The Court found that the union was in effect seeking federal appellate review of the state court determination that *Jacksonville Terminal* did not require that the state court injunction be dissolved. *Id.*

Atlantic Coast Line is distinguishable from the present case in at least two respects. First, the issue of res judicata barred relitigation of issues that could have been raised in the original federal action was not presented in *Atlantic Coast Line.* The union in *Atlantic Coast Line* did not argue that the federal injunction was proper because the issue of whether the federal right to picket precluded state court injunctions could have been raised in the prior federal proceeding. Instead, CLE argued that question had in fact been decided in the prior proceedings, and the Supreme Court rejected that contention on the record before it. In the present case, however, this Court affirmed the district court's finding that the issues raised in the state court proceeding should have been raised as pendent claims in the BHCA action and therefore were barred under res judicata principles. *Parsons II,* 747 F.2d at 1374, 1379. Precedent binding on this Circuit clearly holds that "a federal court may enjoin a state court proceedings which is precluded under the doctrine of res judicata." *Woods Exploration & Producing Company v. Aluminum Co. of America,* 438 F.2d 1286, 1312 (5th Cir. 1971), cert. denied, 404 U.S. 1047, 92 S.Ct. 701, 30

L.Ed.2d 736 (1972). We find nothing inconsistent between that precedent and the Supreme Court decision in *Atlantic Coast Line.*[7]

Second, unlike the situation in *Atlantic Coast Line,* the present case does not involve an improper attempt to seek federal appellate review of a state court decision. As discussed above, the state court determination that the failure to raise the state claims in the BHCA action did not operate as a bar to raising the claims in the state action was not final at the time the district court issued its injunction in this case. Thus, although Appellees waited until a late point in the state court exception, but rather that the injunction at issue in *Atlantic Coast Line* was not proper as necessary in aid of the district proceeding to seek an injunction, they did so before the state court had made a final

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[7] In support of their position, Appellants point to language in *Atlantic Coast Line* where the Court stated that "[w]hile the railroad could probably have based its federal case on the pendant state law claims as well, it was free to refrain from doing so and leave the state law questions...to the state courts" because "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." 398 U.S. at 295, 90 S.Ct. at 1747 (citations omitted). This language, however, appears in the Supreme Court's discussion of whether the injunction was proper as necessary in aid of the district court's jurisdiction and not in its discussion of the propriety of the injunction under the relitigation exception. In that context, it is clear that the Supreme Court did not intend to suggest by this language that the res judicata effect of a prior federal judgment could not justify an injunction under the relitigation court's jurisdiction because under the concept of concurrent jurisdiction, both the federal and state court had jurisdiction to proceed simultaneously.

determination with regard to the preclusion issue.[8] In *Atlantic Coast Line,* however, the state court's denial of BLE's motion to dissolve was final, and BLE chose to seek an injunction in federal court rather than appealing that decision, thereby, in effect, attempting to obtain improper appellate review of the state court decision by the federal court.

[8] We also find without merit Appellants' argument that the injunction was improper because *Parsons I* Court upheld the district court's grant of judgment n.o.v. on a different rationale from that given by the district court. While, as Appellants argue, the preclusive effect of a judgment is determined by the decision of the appellate court when that decision rest on different grounds from the district court's decision, see J. Moore, 1B Moore's Federal Practice para. 0.416[2], at 518-19 (2d ed. 1984), that principle does not alter the res judicata effect of the BHCA action in this case. Even assuming this Court's decision in *Parsons I* rested on different grounds from that of the district court, it is clear that both this Court's decision and the district court's decision were on the merits and, therefore, the fact they

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[8] We note that in *Parsons II* this Court upheld the district court's finding that Appellees' failure to seek a federal injunction at an earlier point in the state proceeding did not operate as a waiver of their right to do so because the vagueness of the state court pleadings made it difficult to determine that the state action involved the same basic cause of action that was tried in the BHCA action. 747 F.2d at 1376. While the Supreme Court in *Parsons III* distinguished the present case from the case of *Toucey v. New York Life Ins. Co.,* 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941), on the basis that "[i]n each of the several cases involved in *Toucey,* the prevailing party in the federal action sought an injunction against relitigation in state court as soon as the opposing party commenced the state action, and before there was any resolution of the res judicata issue by the state court" while in this case Appellees "chose to fight out the res judicata issue in state court first, and only after losing there did they return to federal court for another try," *Parsons III,* 106 S.Ct. at 772, the Supreme Court did not question this Court's affirmance of the district court's finding that the Appellees were excused for failing to seek an injunction at an earlier point in the state proceedings, and we find no reason to alter that determination.

may have been based on different grounds does not alter the determination as to Appellants' state law claims.

Finally, we find without merit the trustee's various arguments challenging the decision of the *Parsons II* Court upholding the district court's finding that the trustee was bound by the BHCA action under res judicata principles because he was in privity with the parties to that action. Parsons II, 747 F.2d at 1379. Those arguments were adequately dealt with by the panel in *Parsons II*, and we find no reason to reconsider that Court's determination with regard to the privity issue.[9] The trustee points out that this Court's prior opinion erroneously stated in affirming the district court's finding of privity that the federal action was pending at the time of the bankruptcy, when in fact Parsons-Montgomery was placed in bankruptcy before the federal action was filed. See id. at 1370, 1379. The timing of the bankruptcy in relation to the filing of the federal action, however, was not critical to the *Parsons II* Court's determination that the district court did not err in its finding of privity. Rather, that Court's affirmance was based on the trustee's knowledge of the federal action, with regard to which he made a deliberate choice not to intervene; the identity of the facts underlying the BHCA claim and the trustee's claims; and the fact Parsons-Montgomery was the entity primarily wronged by the alleged activities of First Alabama and thus would have been the party entitled to most of the damages. *Id.* at 1379.

[9] A district court had discretion to determine whether federal interference with state proceedings is warranted pursuant to the relitigation exception to the Anti-Injunction Act and, within that discretion, a district court in a given case may go either way and not be reversed. *Delta Air Lines*, 708 F.2d at 587. We cannot say that issuance of this injunction exceeded the bounds of the district court's discretion.

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[9] We note that this issue was presented for review to the Supreme Court, but that Court found it unnecessary to reach the issue. *Parsons III*, 106 S.Ct. at 773 n.4.

C. Motion to Recuse

Parsons argues that the district judge should have recused himself because he has a personal bias against Parsons based on extrajudicial information. Parsons presented his request for recusal in the form of a letter, which the district judge construed as a motion to recuse. The information of which Parsons complains is evidenced by two statements in the district court's opinion, one showing the district judge's knowledge that Parsons had brought suit against his former attorneys, who represented him in this litigation through the time of the Supreme Court decision in *Parsons III,* and the other being a statement to the effect that "Mr. Parsons had secured a recusal by a State Court Judge by writing a similar letter to him.

The district court held that recusal was not appropriate because "the Court's only association with Mr. Parsons and any opinion that it may have of him has been gained in open Court." The district court also noted that Parsons had refused to appear at the hearing held on the motion as requested by the district court and that "the matter was presented with no evidence and no insistence upon the motion by anyone whatsoever, including Mr. Parsons' attorney." The district court also indicated that it had been "hasty and overcautious in construing the letter as a motion."

[10,11] Bias sufficient to disqualify a judge must "stem from personal, extrajudicial sources" unless "pervasive bias and prejudice is shown by otherwise judicial conduct." *United States v. Gregory,* 656 F.2d 1132, 1137 (5th Cir. Unit B 1981). Parsons has failed to present evidence sufficient to demonstrate bias in this case.

D. Motion to Supplement the Record

Appellants have moved to supplement the record with 122 pages of material from the official court record in the state action. Appellants assert that these documents are necessary for

this Court to have an accurate knowledge of what transpired in the state court proceeding.

[12,13] This Court has the discretionary power to supplement the record on appeal, even to include evidence not reviewed by the court below. *Dickerson v. Alabama,* 667 F.2d 1364, 1367 (11th Cir.), cert. denied, 459 U.S. 878, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982). We find no need, however, to exercise that discretion in this case. The thrust of the supplemental material is that the state judge has considered the res judicata issue on the merits and determined it adversely to Appellees. That fact is already clear from the record before us. As discussed above, the issue is not whether there had been a determination on the merits in state court, but whether that determination was final for preclusion purposes. Therefore, there is no need to supplement the record on this point. Further, although Appellants suggest that the district court may have referred to documents not in the record in reaching its decision, they have been unable to point to any specific documents not already in the record that were relied upon by the district court. The motion to supplement record is denied.

E. Findings Regarding Basis of UCC Claim

In *Parsons II,* this Court held that the factual record was insufficient to determine whether the trustee should be precluded from asserting his UCC claim. 747 F.2d at 1380. The Court found that if the trustee's claim was based "on factual allegations different from those underlying the fraud and BHCA claims" then he should not be precluded by the former federal judgment. *Id.* Therefore, the Court remanded for a determination whether the claim was based "on facts involving solely the conditions of the sale itself" rather than on allegations that the pre-sale activities of First Alabama and Orange had resulted in the receipt of an unfairly low price. *Id.* at 1381. On remand, the district court ordered the trustee to state his claim with specificity and then determined that the UCC claim was based on the pre-sale transactions also involved in the BHCA action.

[14] The trustee argues that the district court's determination that the trustee's UCC claim arose out of the same transactions as those forming the basis of the BHCA claim was clearly erroneous. We cannot agree. In response to the district court's order requiring that the UCC claim be stated with specificity the trustee gave the following basis for the claim: (1) the sale was a private sale two days after repossession; (2) only one potential buyer was notified of the sale; (3) the buyer (Orange) had no experience in the steel business and no prior knowledge of the value of the assets; (4) no one in the steel business and no unsecured creditor was contacted as to the date and time of the sale; (5) no notice was given to the attorney for Parsons-Montgomery prior to the sale; (6) no notice was placed in any trade or other publications; (7) no one except the seller, purchaser and the purchaser's attorney was present; (8) the sale took place in Herbert's office, rather than a public place; (9) the price was determined in accordance with the amount of the debt; (10) only one bid was offered and accepted; and (11) the sale price was $907,252.85 while the collateral had a value in excess of $2,500,000. The district court did not err in finding that all of these facts related to the pre-sale actions of Appellees.[10]

For the reasons stated above, the judgments of the district court are AFFIRMED.

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[10] The trustee also asserts that the district court based its judgment on collateral estoppel rather than res judicata and that, therefore, its determination is clearly erroneous because the UCC issue was not litigated in the federal action. It is clear, however, that the district court determined that the UCC claim was barred under res judicata principles.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 83V-181-N

FIRST ALABAMA BANK OF MONTGOMERY,
N.A.; ET AL,
Plaintiffs,

VS.

PARSONS STEEL, INC.; ET AL,
Defendants.

OPINION

History of the Case

This cause is submitted on remand by the Court of Appeals, *Parsons Steel v. First Alabama Bank,* 747 F.2d 167, to this Court in conformance with the Opinion of the Supreme Court, *Parsons Steel v. First Alabama Bank,* 88 L.Ed.2d 877, directing this Court on remand to determine and apply Alabama preclusion law and, in the event that this Court should conclude that the State Court judgment theretofore entered is not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, to decide the propriety of a federal court injunction under the general principles of equity, comity and federalism discussed in *Mitchem v. Foster,* 407 U.S. 225, 243, 32 L.Ed.2d 705, 92 S.Ct. 2151.

In order to accomplish this, this Court must consider the rather lengthy history of this case, as well as its related predecessors in the State and federal courts in Alabama and in the United States Court of Appeals for the Eleventh Circuit and the Supreme Court. On January 17, 1979, the Parsons[1] filed a suit in the Circuit Court of Montgomery County, Alabama. Later in the same year, the Parsons filed another suit in this

Court against substantially the same Defendants.[2] The State Court case lay dormant until late 1982, over a year after this Court's final judgment for the Bank, and in 1983 resulted in verdicts and judgments for the Parsons totaling four million dollars. This proceeding involves the effect of the judgments, each to the other, in these two suits, which this Court has concluded involved substantially the same issues and parties. This remand is to consider the preclusive effect of the determination by the State Court on motion for summary judgment and motion to dismiss that the final judgment of this Court entered on June 17, 1981, was not a res judicata preclusion of the State Court proceeding several years after this Court's judgment in June, 1981.

The State Court Judge recognized in a Bench note a few days before trial that the issue of res judicata involved a question of law to be decided by the Court after denial of the Bank's motions to dismiss and for summary judgment based on the theory of res judicata preclusion, but he did not thereafter mention the res judicata issue. He issued judgment on the jury verdicts for the Parsons totaling four million dollars and was appointed to the State Court of Criminal Appeals before consideration of the final res judicata issue on the Bank's motions for judgment notwithstanding the verdict. Various pretrial motions for dismissal

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[1] The Defendants herein [hereinafter referred to as the Parsons] include Mr. and Mrs. Jim D. Parsons, a bankrupt family-owned steel corporation in Montgomery, its Trustee in Bankruptcy and a Parsons' family-owned steel corporation in Mobile. For purposes of this suit, interests of these Defendants are the same.

[2] Defendants were the Plaintiffs herein, being the Bank, now the First Alabama Bank of Montgomery, its Vice President Ed Herbert, and others with whom we are not concerned in this case, all being hereinafter referred to as the Bank. This Court entered judgment therein for the Defendants [unpublished opinion, USDC M.D. Ala. #79-249-N], affm'd. *Parsons v. First Alabama Bank,* 679 F.2d 242, cert.den. 106 S.Ct. 768.

and for summary judgment had been filed by the Bank on the basis that the federal court had already decided the issues in the State Court case (and those issues which should and could have been presented in the federal court) between the parties and their privies. Without opinion and without indicating why said motions were denied, the State Court denied all of such motions and proceeded to trial in the case. As noted above, the State Court Judge's Bench note of January 27, 1983, cited in Trustee's brief of April 23, 1986, in this Court, shows that the State Judge, in denying a motion in limine, indicated his "general impression that the issue of res judicata is an issue properly to be decided by the Court rather than an issue to be presented to and decided by the jury." This indicated both that the issue was to be treated as one of law and that it was "*** to be decided ***", not that it had been decided. This entry was made a few days before trial began.

Thereafter, the Court denied all directed verdict motions properly made without discussing res judicata issues and entered judgment on the verdict on February 9, 1983. Apparently, he felt the issue could best be reserved for post-trial motion.[3] The Bank timely filed its motion for judgment notwithstanding the verdict and for new trial, including a claim of the preclusive effect of the prior federal judgment. Those motions were still pending in State Court, as they now are, when subject injunction was entered in this Court.

Encouraged by the fact that the State Court never gave any reason for denying the various motions based on the res judicata preclusive effect of the federal judgment, the fact that the State Judge entered in a bench note dated a few days before the trial that the res judicata issue was a question of law to be decided

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[3] Rule 50, Alabama Rules of Civil Procedure, approves the practice of taking a verdict in questionable cases, but reserving mature and final consideration of questionable legal matters to be determined on motion for new trial or for judgment notwithstanding the verdict.

later by the Court and by the fact that the res judicata issue was never mentioned in the final judgment in the case, the Bank's attorney filed a motion for judgment notwithstanding the verdict and, in the alternative, for new trial in the State Court. These motions are pending today. Discouraged, however, by the fact that the State Court Judge did not enter any order or judgment based on the theory of res judicata in which he expressed any reasons for his order and by the fact that the State Court Judge entered a judgment on the verdict and ascended to the State Court of Appeals without mentioning the issue, the Bank's attorneys filed the instant proceeding, *First Alabama Bank, et al v. Parsons Steel, et al,* in which they sought, pursuant to the relitigation exception to the Anti-Injunction Act [28 U.S.D. § 2283] to restrain implementation and enforcement of the State Court's judgment, totaling four million dollars and effectively nullifying a judgment notwithstanding the verdict for the Bank in this Court which had then been affirmed by the United States Court of Appeals and upon which certiorari was later denied by the Supreme Court of the United States. Perhaps he returned to this Court in order to avoid the necessity of acquainting yet another court with the pleadings and evidence in both cases.

This Court, being of the opinion that this Court decided substantially the same issues between *substantially the same* parties, at least a year before the four million dollar judgment in the Circuit Court of Montgomery County, Alabama [hereinafter sometimes referred to as the State Court or State Trial Court] and being of the opinion that it had a duty to protect the parties from relitigation of issues litigated in this Court, entered an injunction on March 29. 1985, against the Parsons' and their privies' attempting to implement or enforce the judgment of the State Court [*First Alabama Bank, et al v. Parsons Steel, et al,* unpublished Opinion #83-V-181-N].

The Parsons, being *encouraged* by their State Court verdict for four million dollars, appealed this Court's injunction of March 29, 1985, to the United States Court of Appeals for the

Eleventh Circuit, which by its Order in *Parsons Steel v. First Alabama Bank,* 747 F.2d 1367, affirmed in part but remanded the case to this Court to determine whether or not the claim of the Trustee in Bankruptcy of the Montgomery Parsons Corporation involved anything that happened during or after the sale which might be considered on the Parsons' claims for violation of the Uniform Commercial Code [UCC]. By Order of March 29, 1985, and being uninformed that the Parsons had petitioned for certiorari, this Court entered its opinion that all of the complaints of the Trustee in Bankruptcy involved matters planned before the date of the sale and were matters that were already complained of or could and should have been complained of in the original Parsons Steel case.

On certiorari, the Supreme Court was of the opinion that, under the law of Alabama, the decision of the State Court on res judicata issue may have effected a res judicata (full faith and credit) preclusion of further litigation thereon and that, if so, this Court would have been barred from entering any injunction against enforcement of the State Court judgment. The Supreme Court, therefore, remanded the case for this Court to determine that question and, if that question were determined adversely to the State Court's judgment's being conclusive of the issue, this Court was to determine whether under the principles of comity, federalism and equity this Court should properly have enjoined the enforcement of the State Court judgment. *First Alabama Bank v. Parsons Steel,* cert. granted 105 S.Ct. 3497, 87 L.Ed.2d 629, rev'd. & remanded 88 L.Ed.2d 877. See Order of Remand to this Court 785 F.2d 929.

Recusal - Certification

After this remand, this Court received a letter from Mr. James Parsons which indicated to this Court that Mr. Parsons felt that this Court was biased against him and that this Court should not hear any further aspects of the case. Thereupon, this Court sent a copy of the letter to all of the attorneys involved and had it filed construing it as a motion to recuse and asked

contributions from all attorneys on the subject. Additionally, this Court, not being sure of the intent of Mr. Parsons in the matter, asked that Mr. Parsons be in attendance at the hearing to be sure that the Court understood his position about the matter and about who was to represent him, he having brought suit against the lawyers who represented him in obtaining the multi-million dollar verdict and theretofore in this Court. Mr. Parsons notified his attorney that he would refuse to be in Court at the time and place in question, stating that he had a reluctance to appear in a Court presided over by this writer and the matter was presented with no evidence and no insistence upon the motion by anyone whatsoever, including Mr. Parsons' attorney. This Court's only association with Mr. Parsons and any opinion that it may have of him has been gained in open Court presided over by this writer, and this Court, being in the position of every judge who sits on any case wherein any person appears as a witness or otherwise, has formed some opinions of Mr. Parsons. Those opinions and the fact that this Court has ruled against that person in the past do not place this Court in a position of recusing himself from further proceedings in the same case. If they do, it is doubtful that any judge could ever complete a complicated case as each individual being in contact with another must necessarily form some opinion of that other person. Federal law indicated that bias is an attitude of extra-judicial origin. *Barkin v. United States,* 362 F.2d 158, cert.den. 385 U.S. 882; *Ferrari v. United States,* 169 F.2d 353. The federal courts have apparently consistently held that bias is not sufficient to be a cause of recusal if it arises out of judicial experience rather than from personal experience with the party. *Knapp v. Kinsey,* 232 F.2d 458, reh.den. 235 F.2d 129, cert.den. 352 U.S. 892. A judge should not disqualify himself because of a litigant's threat to sue the judge or because of a litigant's surly remarks. *In re Martin-Trigona,* 573 F.Supp. 1237 (Conn. 1983). To require recusal, the alleged bias of the judge must be both personal (directed against a party) and extra-judicial. *United States v. Kelley,* 712 F.2d 884 (1982). Although Mr. Parsons had secured a recusal by a State Court

Judge by writing a similar letter to him, in consideration of the facts and the law hereinabove set out, this Court was of the opinion that the attorney for Mr. Parsons and, perhaps, even Mr. Parsons himself had little interest in having this Court recuse himself. Irrespective of interest, this Court is of the opinion that a judge should not recuse himself because of an opinion of a party in a lawsuit formed during the litigation. This writer has had no contact with Mr. Parsons other than in the litigation involved in these matters. It is the opinion of this Court that this Court was hasty and overcautious in construing the letter as a motion and that it should not recuse itself. It is, therefore, the opinion of this Court that the motion for recusal should be denied.

In further reference to the motion to recuse, this Court suggested to the attorneys at the hearing and before the hearing that perhaps this Court should certify the legal questions on Alabama law to the Supreme Court of Alabama for its consideration thereof. The initial reaction of all of the attorneys, including Mr. Parsons' private attorney, was that this litigation had already reached extreme proportions, that to submit the matter to a new Court unfamiliar with either of the earlier proceedings would not be a wise solution to anything and would only probably prolong litigation. This Court was of the opinion that all attorneys were agreed that this Court should decide the matter. Thereafter, the Hon. Jerry Wood, attorney for the Trustee in Bankruptcy, had some second thoughts about the matter, but the majority of the attorneys present consistently appeared to feel that the matter should not be referred to any other Court. This Court is of the opinion that, as the matter has been exhaustively presented already to all of the federal courts and no State Judge is available who has knowledge of the case, the parties will best proceed in this Court and that any possible error of this Court may be more easily corrected than if the parties re-present all of the litigation to a new series of courts.

Res Judicata - Full Faith and Credit

This Court's first inquiry is not limited to the question under Alabama law and the Full Faith and Credit Act of the preclusive effect of the Alabama State Court's denial of the Bank's motion for summary judgment.[4] Thereafter, if this Court determines that Alabama law limits res judicata effect to final judgments, then this Court must determine whether doctrines of equity, comity and federalism require this court to yield its previously exercised jurisdiction to a State Court's obliteration of a federal judgment after its successful progress throughout federal review. This Court, in granting the injunction in this case, has fully compared the issues and evidence in the State and federal trial courts and will not again belabor that question, nor shall this Court again belabor the determination that the pleadings and factual issues were so vague in both trial courts that it was not clear until after final argument in the State Court that essentially the same cause of action was involved in both cases and that the prior federal judgment was in serious danger of being nullified. Indeed, this Court found it necessary to require Trustee's attorney to specifically state his State Court claims so as to satisfy the Court of Appeals that the same issues were available in both cases.

There can be no doubt that federalism, comity and the Full Faith and Credit Act provide that a federal court must give the same preclusive effect to a State Court judgment as another court of that State would give. *Parsons Steel v. First Alabama Bank,* 88 L.Ed.2d 877. As the Supreme Court in this case pointed out, "Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable," and the federal court is helpless to intercede even [in the words of 28 U.S.C. § 2282] "*** where necessary to protect

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[4] That question is tempered by the Alabama judgment on the verdict without a final res judicata ruling when the State Judge recognized the issue as one of law.

or effectuate its judgment." This Court construes the *Parsons* Supreme Court to hold that, even though a federal court has entered a prior final judgment, even if difficulty arises in proving that a State Court's concurrent jurisdiction involves the same cause of action between the same parties until after all evidence is presented in State Court, the federal court has no right to enter an injunction to protect or effectuate its prior judgment if the applicable State law recognizes the State judgment as a res judicata preclusion. The Supreme Court makes plain that, in spite of the wording and apparent congressional intent of the Anti-Injunction Act, challenges to the correctness of a State Court's determination as to the conclusive effect of a prior federal judgment (if conclusive under the law of the subject State) must be pursued by way of appeal through the State Court system and certiorari from the Supreme Court. If, on the other hand, that State Court's judgment is not conclusive, then the provisions of the Anti-Injunction Act's relitigation exception is still limited by the *Younger* doctrine (equity, federalism and comity) expressed in *Michem v. Foster,* supra. So limited to these confines but concerned about the resulting disregard for federal court authority, this Court must approach this case through the narrow remains of the relitigation exception.

It is difficult to understand how this court could more clearly be called upon to protect or effectuate its judgment than to have a State Court effectively hold its prior Defendants' judgment for naught and grant a four million dollar Plaintiffs' judgment for the same circumstances. The State Court, giving no reason and articulating no set of circumstances, denied all motions based on the ground that this Court's prior judgment precluded further State Court litigation of the same circumstances between the same parties and their privies. It considered this defense, however, only on motion to dismiss and motion for summary judgment. It never considered the res judicata defense on the merits of the case after hearing the evidence. The res judicata defense, involving a question of law, was properly not submitted to the jury and properly remains to be decided on the Bank's

motion for judgment notwithstanding the verdict or for a new trial. The record does not show that the State Court has ever ruled on the res judicata issue based upon a comparison of the pleadings, the evidence and the issues in both cases. Its rulings on the preliminary motions were not final judgments. This Court is the first court to rule on the res judicata issue based upon the merits and in a final judgment. Elements of a res judicata defense are set out by the Supreme Court of Alabama in *Braggs v. Jim Skinner Ford,* 432 So.2d 466, 468 (Ala. 1983), as follows: "(1) prior judgment rendered by court of competent jurisdiction; (2) prior judgment rendered on the merits; (3) parties to both suits substantially identical; and (4) same cause of action present in both suits."

In *Lane v. Central Bank of Alabama,* 756 F.2d 814 (11th Cir. 1985), the Court of Appeals, construing Alabama law, concluded that, since State Courts have concurrent jurisdiction with federal courts to hear claims arising under the Bank Holding Company Act, plaintiff's claim under the Bank Holding Company Act in a subsequent federal proceeding was barred by the doctrine of res judicata because plaintiff failed to assert it in his prior State Court action involving the same facts relied upon by plaintiff in the federal court.

This Court has found no Alabama law directly in point, and has been cited none, as to the preclusive effect of a denial of a res judicata defense by denial of motions to dismiss or for summary judgment after the case has progressed to judgment on a verdict and motions for judgment notwithstanding the verdict and for new trial. It is clear, however, that pendency of a case in one court with concurrent jurisdiction does not effect a res judicata bar to an identical suit in another court with jurisdiction. *Logan v. O'Barr,* 122 So.2d 376, 271 Ala. 94. It has long been held that interlocutory decrees generally are not final and, therefore, cannot be pleaded as res judicata in bar to another action. *McLane v. Spence,* 11 Ala. 172.

In *Sterling Oil of Oklahoma, Inc. v. Pack,* 287 So. 847, at 861, the Supreme Court of Alabama, being of the opinion that in the particular circumstances a federal summary judgment was appealable, stated the following: "We believe the *appealable nature* of such order—given the other prerequisites—*is* the *controlling* factor; and we, therefore, hold that the principle of comity requires that we give res judicata effect to the judgment of the federal court, *applying Alabama substantive law,* ***" [emphasis added]. In short, it appears that the Alabama Supreme Court holds that, where judgment in the first proceeding is not appealable, that judgment is not entitled to full faith and credit in another State Court.

Alabama law of res judicata preclusion of an appeal from a prior judgment of a second judgment finalized by nonappeal pending appeal is expressed in an earlier case, *Watson v. Mobile & Ohio Railway Co.,* 173 So. 43, 233 Ala. 690.[5] There plaintiff took appeal from an adverse State Court final judgment and, pending appeal, pursued the same matter to a final federal court judgment, again for the defendant. Thereafter, without appealing from the federal judgment, the plaintiff sought to pursue the appeal in the State Court to which the defendant, appellee, contended that the federal court action, not being timely appealed, was an estoppel by res judicata of the appeal in the State

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[5] Dicta in *Watson v. Mobile & Ohio Railway Co.,* 17 So. 43, 45 (Ala. 1937), shows the attitude of the Supreme Court of Alabama as to the finality of the State Court judgment on the verdict in light of the pending motion for judgment notwithstanding the verdict. That Court pointed out that, assuming federal court jurisdiction, "The judgment could not be attacked collaterally. Proof dehors the record to show the invalidity of the judgment is not permitted on collateral attack. 15 R.C.H. § 373, p. 892." That Court pointed out that, assuming a final federal judgment, the losing party in that judgment "*** could only redress *** by direct application to the court which rendered the judgment, or by bill in equity;" [at 45] and "that a judgment rendered by a federal court in this State is *** a" domestic judgment and should be accorded the same verity as one rendered by the courts of general jurisdiction of this State."

Court. Interestingly, in that case, no res judicata issue was raised by the defendant in the federal court action though final judgment on the matter had theretofore been entered in the State Court action and an appeal lodged therefrom. The Alabama State Supreme Court determined that the judgment of the federal court, not having been appealed timely, could not be attacked collaterally and that the judgment rendered by the federal court in the State of Alabama must be regarded as a "domestic judgment" and should be accorded the same verity as one rendered by the courts of general jurisdiction of this State. BLACK ON JUDGMENTS, § 285; *Pierce v. Winter Iron Works,* 32 Ala. 68; *Riverdale Cotton Mills v. Alabama & Georgia Manufacturing Co.,* 198 U.S. 188, 25 S.Ct. 629, 49 L.Ed. 1008; 15 Ruling Case Law 364. p. 886. The Supreme Court of Alabama thereupon dismissed the appeal of the State Court case, leaving judgments for the defendant in both State and federal courts.

Here, the first final judgment was in federal court. The first judgment was pleaded as a basis for res judicata in the State Court at every opportunity. Applicability of res judicata was preliminarily denied by the State Court which, except for the res judicata issue, proceeded to judgment on the merits. From this State Court judgment, Defendants filed a motion for rehearing or for judgment notwithstanding the verdict which is still pending in the State Court.

It has long been the law where a prior judgment goes both to defects of form and also to the merits, a judgment which does not designate as between the two will be presumed to rest on the former. But if the judgment on demurrer is on the merits, it becomes "res judicata," *Bissell v. Spring Valley,* 124 U.S. 225, 232, 8 S.Ct. 495, 31 L.Ed. 411. Herein, the State Court's rulings on res judicata would be presumed to rest upon form rather than on the merits.

The State Court decided, not that the prior federal judgment did not preclude on res judicata principles a State Court's deter-

mination of the issues, but that (on motions to dismiss and for summary judgment) the pleadings and evidence then before the court were inconclusive. The Court found, neither that the Parsons were entitled to recover, nor that there was no material issue of fact, but simply that the Bank was not entitled to dismissal or summary judgment as a matter of law at that stage of the proceedings. There was no further ruling on the question of res judicata preclusion. The res judicata question, being a question of law, was preserved for the ruling on motion for judgment notwithstanding the verdict.

If in *Watson* the unappealed federal judgment, obtained pending the appeal of the prior State Court judgment, effected a res judicata bar to the appeal of the State Court's judgment, it would appear that the instant federal court judgment, processed throughout the federal courts and terminated before the motions were determined in the State Court, would bar further proceedings in the State Court under Alabama law.

But that is not the question here. The question here is whether the State Court's rulings on res judicata are entitled to full faith and credit.

There is no final judgment in the State action and, thus, no judgment with preclusive effect. Only final judgments have preclusive effect in Alabama, and Alabama law is also clear that finality for preclusion is measured by the same standard as finality for appeal. In *Sterling Oil of Oklahoma v. Pack,* 291 Ala. 727, 744, 287 So.2d 847 (1974), the Court held:

> "The legal test, of course, is the finality *vel non* of such judgment ***.
>
> "*** We believe the appealable nature of such order—given the other prerequisites—is the controlling factor ***."

Sterling Oil was recently cited with approval for the Alabama rule that, "[w]here there has been no prior final judgment, the

doctrine of res judicata cannot apply." *Chandler v. Commercial Union Ins. Co.*, 467 So.2d 244, 251 (Ala. 1985).[6]

CODE OF ALABAMA [1975], § 12-22-2, specifically provides that appeals as of right lie only from final judgments:

> "From any final judgment of the circuit court *** an appeal lies to the appropriate appellate court as a matter of right by either party *** within the time and in the manner prescribed by the Alabama Rules of Appellate Procedure."

Indeed, under Alabama practice, the appellate court must dismiss appeals from nonfinal judgments, *ex mero motu. Foster v. Greer & Sons*, 446 So.2d 605, 609 (Ala. 1984); *Martin v. Hinson*, 364 So.2d 674 (Ala. 1978); *Powell v. Rep. Nat'l. Life Ins. Co.*, 293 Ala. 101, 102, 300 So.2d 359 (1974).

Plainly, the State Court orders denying summary judgment are neither final nor preclusive. Such orders are merely interlocutory and are not entitled to preclusive effect. Moreover, the February 9, 1983, judgment on the jury verdict lost its finality by virtue of the timely filed and pending post-trial motions under Rules 50 and 59, Alabama Rules of Civil Procedure. An appeal filed during the pendency of these motions would have been premature and would have been dismissed. Rule 4(a)(3), Alabama Rules of Appellate Procedure; Rule 59.1, Alabama Rules of Civil Procedure, see, e.g., *Super Value Stores v. Peterson*, No. 85-484 & -523 (Ala. S.Ct. March 6, 1986). Federal authorities accord. *Leishman v. Asso. Wholesale Elec. Co.*, 318 U.S. 203, 87 L.Ed. 714 (1943); *Williams v. Bolger*, 633 F.2d 419 (5th Cir. 1980); *Turner v. HMH Publishing Co.*, 328 F.2d 136

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[6] Accord, *Food Service Distributors v. Barber*, 429 So.2d 1025, 1027 (Ala. 1983); *Quinnelly v. City of Pritchard*, 292 Ala. 178, 182, 192 So.2d 295, 298 (1974); *Ashurst v. Preferred Life Assur. Soc. of Montgomery*, 282 Ala. 119, 126, 209 So.2d 403, 408 (1968).

(5th Cir. 1964); *Healy v. Pennsylvania R. Co.*, 181 F.2d 934 (3rd Cir. 1950).[7]

Accordingly, there are no Alabama judgments in this case which are final and, thus, none which are entitled to preclusive effect under Alabama law. The summary judgment orders are interlocutory. The timely filed post-trial motions rendered the judgment on the jury verdict nonappealable and, thus, non-preclusive. The Alabama Supreme Court in *Food Services Distributors v. Barber*, 429 So.2d 1025, at 1027, held that there is no res judicata effect where the procedural status of the case is such that the trial court may reconsider its ruling on a motion for summary judgment and may correct an erroneous ruling at any time before final judgment. This is apparently the reason that the Alabama courts agree that a denial of a motion for summary judgment is generally not a res judicata bar to trial of the same issues in another case.

At the time this Court issued its injunction (and at present), the post-trial motions were pending before the State Court. Under Alabama law, no appeal could properly be taken while these post-trial motions are pending and unresolved. Since the State Court judgment was not appealable at the time this Court's injunction was issued, that injunction was unfettered by any Alabama judgment entitled to preclusive effect as a final judgment under Alabama law. The reason for this rule is clear. Until judgments are final, they are subject to revision by the trial court at any time.

Appellate courts, including those of this circuit,[8] have repeatedly held that it is "usually desirable" for trial courts to

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[7] Alabama has held that federal decisions guide construction of Alabama rules. *Ross v. Luton*, 456 So.2d 249, 257 (Ala. 1984); *Scott v. Lane*, 414 So.2d 939, 941 (Ala. 1982); *Powell v. Republic Nat'l. Life Ins. Co.*, 293 Ala. 101, 103, 300 So.2d 359 (1974).

[8] See, e.g., *Green v. Reynolds*, 328 F.2d 372 (5th Cir. 1964).

take a verdict, and then pass on the sufficiency of the evidence and other dispositive legal matters on a post-verdict motion. 9 Wright & Miller, FEDERAL PRACTICE & PROCEDURE, § 2533. Alabama practice, as shown in the committee comments to Rule 50, Alabama Rules of Civil Procedure, accords:

> "The motion for judgment notwithstanding the verdict tests the sufficiency of the evidence in just the same way as does the motion for directed verdict at the close of all the evidence. *In a doubtful case* the *court* may prefer to *deny the motion* for a directed verdict, *and consider the attack on the sufficiency of the evidence subsequently on motion for judgment n.o.v.* This course gives the court more time to consider the matter, the verdict of the jury, if in accord with the judge's own ideas as to the sufficiency of the evidence, may settle the matter, and after verdict the court may grant a new trial on the ground that the verdict is contrary to the great weight of the evidence, instead of directing judgment." [emphasis added]

Indeed, at the time this Court's injunction was entered, a State Court trial judge had before him the Bank's res judicata defense for decision without any presumption afforded the prior interlocutory orders on that question.

In accord is a recent Eleventh Circuit case applying Georgia law, *Cable Holdings of Battlefield v. Cooke,* 764 F.2d 1466, 1473 (11th Cir. 1985). There, the district court, which gave full faith and credit to a Georgia State Court judgment, was reversed:

> "Under the Full Faith and Credit Act, a federal court is required to give res judicata effect to state court judgments only to the extent that the courts of the state in which the judgment was entered would so so ***.
>
> "*** [R]es judicata effect will be given only to final judgments ***. Furthermore, '[d]icta in a recent Georgia Supreme Court case, *Culwell v. Lomas & Nettleton Co.*,

242 Ga. 242, 248 S.E.2d 641 (1978), indicates *that finality for res judicata purposes is measured by the same standard as finality for appealability purposes.' ***."* [citations omitted; emphasis added]

Similarly, since the only State Court judgment pending at the time of this Court's injunction on June 15, 1983, was nonfinal and would not support an appeal—because of the pendency of the unresolved post-trial matters—the State Court judgment was not final and was not entitled to preclusive effect. Accordingly, the State Court's judgment was not entitled to full faith and credit.

The Supreme Court of Alabama in *Food Service Distributors v. Barber,* supra, 429 So.2d at 1027 (Ala. 1983), clarified the position of the Supreme Court of Alabama that a pretrial denial of motion for summary judgment based upon res judicata would not effect a res judicata preclusion of that issue and further expressed the law of Alabama that, where the Court may reconsider its ruling and correct an erroneous ruling, its prior ruling is not a res judicata preclusion of the issue:

"Appellant Food Service contends that the denial of Barber's motion for summary judgment in the first instance should have been the law of the case or res judicata as to any subsequently filed motion for summary judgment. We do not agree.

"There can be no res judicata effect on the denial of summary judgment since, for res judicata to apply, there must have been a final judgment rendered on the merits of the case. *Reliance Ins. Co. v. Substation Products Corp.,* 404 So.2d 598 (Ala. 1981); *Wheeler v. First Alabama Bank of Birmingham,* 364 So.2d 1190 (Ala. 1978). Denial of a motion for summary judgment is not a final judgment.

"We recognize that, in some jurisdictions, denial of a motion for summary judgment becomes the law of the case, and bars rehearing of a subsequent motion for summary

judgment unless new grounds are asserted or new proof offered. See, e.g., *Federal Deposit Ins. Corp. v. Park Lane Realty Associates,* 72A.D.2d 788, 421 N.Y.S.2d 611 (1979); *Fraser v. Doing,* 130 F.2d 617 (D.C. Cir. 1942). We are of the opinion, however, that Illinois provides the better rule; a court may reconsider its ruling on a motion for summary judgment and may correct an erroneous ruling at any time before final judgment. *Roach v. Village of Winnetka,* 366 Ill. 578, 10 N.E.2d 356 (1937)." *Food Service Distributors,* supra, at 1027.

The recently developing insurance law of the State of Alabama arising from application of the Alabama law of res judicata as its applies to the necessity for trying actions on insurance policies and actions for "bad faith" failure to pay or to investigate an insurance claim in one cause of action is in accord. The Alabama courts have held that the bad faith claim is generally a compulsory claim to be brought in the original suit by the plaintiff seeking to collect on an insurance policy and that the failure to do so is a res judicata bar to a subsequent claim for bad faith. *Safeco Ins. Co. of America v. Sims,* 435 So.2d 1219 (Ala. 1983); *Federated Guaranty Life Ins. Co. v. Wilkins,* 435 So.2d 10 (Ala. 1983);[9] but in *Chavers v. National Security Fire & Cas. Co.,* 456 So.2d 293 (Ala. 1984), that Court clarified its prior rulings by holding that a bad faith claim brought subsequent to the conclusion of an action on the policy was not subject to summary judgment based on res judicata,

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[9] In *Federated Guaranty Life Ins. Co. v. Wilkins,* a suit for a declaratory judgment of nonliability on an insurance policy, a counterclaim by an insured for bad faith refusal to pay was stricken by the trial court on a preliminary motion by the insurer. The plaintiff later brought a separate suit for bad faith "identical in language" to the counterclaim which had been dismissed by the trial court in the declaratory judgment proceeding. The Supreme Court pointed out that the declaratory judgment action was not tried to a conclusion and, there being no prior final judgment, the doctrine of res judicata cannot apply to preclude relitigation thereof.

where it was not clear that the plaintiff knew or should have known of the insurance company's alleged bad faith soon enough to join the bad faith issue in the suit on the policy. The cases are consistent with this Court's application of the Alabama law of res judicata preclusion in this case.

Alabama law seems to generally conform to that expressed in several federal decisions.

The decision of a motion for summary application is not to be regarded in the light of res judicata, or as so far conclusive upon the parties as to prevent their drawing the same matter and question again in the more regular form of an action, *Denny v. Bennett,* 128 U.S. 489, 9 S.Ct. 134, 32 L.Ed. 491.

In *Bienville W.S. Co. v. Mobile,* 186 U.S. 217, 22 S.Ct. 820, 46 L.Ed. 1132, it was held that, unless the former record is presented at the hearing of the second case, effect will not be given to it as res judicata, but the court may take judicial notice of its own records and examine and consider the former record where the case was as to plaintiff's splitting its cause of action. Apparently, the record of the federal court in this case was not presented to the State Court for its consideration of res judicata contentions by it.

Preliminary decisions of the trial court denying motions to dismiss or for summary judgment are not final judgments. Where the trial court has not finally adjudicated the res judicata issue and a jury has determined the other defenses in their verdict, the remaining legal question (res judicata) should be called to the trial court's attention by a motion for judgment notwithstanding the verdict. That motion is still pending in the Parsons' State Court proceeding.

This Court finds (1) that, pursuant to the law of Alabama, a State Court's denial of a motion to dismiss and a motion for summary judgment for a defendant based on an alleged res judicata bar would not result in a preclusion of another court's consideration of the res judicata defense; (2) that the State

Court here in question litigated (but not to the extent of final or appealable judgment) substantially the same issues (though pleaded differently) between the same parties (or their privies) as were therefore litigated in this Court to the extent of final judgment; (3) that the State Court has not finally rejected the claim of res judicata; and (4) that the State Court judgment has no preclusive effect under Alabama law.

This accommodates, in this Court's opinion, the Supreme Court's construction of the Anti-Injunction Act vis-a-vis the Full Faith and Credit Act by "*** limiting the relitigation exception of the Anti-Injunction Act to those situations in which the State Court has not yet ruled on the merits of the res judicata issue" *Parsons,* supra, 88 L.Ed.2d at 883-4.

Atlantic Coast Line and Mitchem Decisions

The Supreme Court has ordered this Court, if it finds that the State Court judgment has no preclusive effect, to determine whether an injunction of the State Court proceeding would be barred by the doctrines of equity, comity and federalism. The Trustee argues that certain language in the Supreme Court Opinion in this case effectively leaves this Court no choice but to decide that principles mentioned in *ACL v. Locomotive Engineers,* 398 U.S. 281, 9 S.Ct. 1739, 26 L.Ed.2d 234 (1970), and *Mitchem v. Foster,* 467 U.S. 225, 243, 32 L.Ed.2d 105, 92 S.Ct. 2151 (1972), proscribe this Court's enjoining further prosecution of the State Court case. This Court is of the opinion that, had the Supreme Court been so inclined, the Opinion would clearly have so directed. This Court understands the mandate of the Supreme Court to direct this Court to decide the issue in the light of cited cases.

In *ACL,* the Supreme Court allowed plaintiff (after being denied an injunction against the Union's picketing pursuant to federal law—the Norris-LaGuardia and Clayton Acts—in federal court) to later seek an injunction pursuant to State law in State Court where the State issues were not pleaded or proved

in the federal court. In *ACL*, when a federal court held that ACL (the plaintiff) had no right to an injunction against defendants' picketing, ACL immediately filed in State Court and the injunction was granted. Res judicata was not then pleaded. No motion for judgment notwithstanding the verdict and no appeal was taken from the State Court judgment.

Two years later the Supreme Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, concluded that unions had a federally-protected right to picket which could not be interfered with by State Court injunctions. Based on that case, defendants (union) filed a motion to dissolve the State Court injunction (which had become final with no review two years before). The State Judge refused to dissolve the injunction, holding Jacksonville Terminal inapplicable (apparently because the State case, not having been timely appealed, had become final and binding on the parties). The union did not appeal but returned to federal court seeking to enjoin enforcement of the State Court injunction. There were then two final State Court judgments for ACL (granting and allowing injunction), neither of which had been appealed, and one prior federal court judgment for the defendant denying an injunction on the narrow issues involved in the Norris-LaGuardia Act. The union sought the federal injunction to enjoin enforcement of the State Court injunction on alternative theories: (1) to protect or effectuate the federal court's prior judgment denying the injunction, or (2) as necessary in aid of the federal court's jurisdiction. The federal district court enjoined the implementation of the State Court injunction. This was affirmed by the Court of Appeals but reversed by the Supreme Court. A part of the Supreme Court's Opinion stresses the fact that the original judgment of the federal court was narrowly based on federal rights under the Norris-LaGuardia Act and that at no point during the entire argument did either side refer to State law, the effects of that law on picketing or the possible preclusion of State remedies as a result of overriding federal law. The majority of the Supreme Court

concluded that the district court's original judgment simply determined that ACL could not enjoin the picketing because of the fact that the Norris-LaGuardia Act, 29 U.S.C. §§ 101, et seq., prohibited *federal courts'* entering injunctions in labor disputes. Since that Court did not decide whether State Courts could enter such injunctions on other grounds, the federal court's judgment and jurisdiction were not under attack in the State Court. The original federal judgment simply decided that the federal court had no jurisdiction to give injunctive relief in picketing cases. There was no final judgment on the merits of whether some other court might do so. The Supreme Court also placed emphasis in *ACL* upon the fact that the appellant union tried to get the federal district court to decide that the State Court Judge was wrong in distinguishing the *Jacksonville Terminal* decision and pointed out that such an appellate review of a State decision should properly be made by a State Appellate Court.

ACL v. Locomotive Engineers, supra, varies from this case in that the federal court's judgment precluded relief on federal law only while this Court considered facts necessary to prove all claims. In *ACL,* the plaintiff's lawyer in open court stated he relied only on the Norris-LaGuardia Act. Here, the Parsons' lawyer pleaded and proved in the federal trial all facts involved in the State case. The majority of the Supreme Court was of the opinion [in *ACL*] that the federal district court's earlier judgment (upon which the district judge based his injunction of enforcement of a subsequent State Court judgment to effectuate his judgment) involved only the narrow determination that the Norris-LaGuardia Act did not provide the basis for enjoining picketing in a labor dispute (at 289) and not whether picketing might be enjoined pursuant to some other law. The later State Court Judge (and later the Supreme Court) concluded that certain State remedies (admittedly not involved in the federal proceeding) were not issues in the earlier federal case. Little, if any, consideration was given to the question of whether those issues could and should have been considered by the federal court.

Perhaps that issue was not litigated in that case. It is an important issue in Parsons. Additionally, those defendants, having initially prevailed in the federal court, proceeded to final judgment in the State Court before seeking a federal injunction; whereas, instant State Court Defendants [the Bank] raised the res judicata issue as soon as possible in the State proceedings and sought federal intervention only when interference with the federal judgment appeared to be a realistic probability.

The current case varies from *ACL* in at least four important features: (1) While in *ACL* no attempt was made to involve State law or remedies (and apparently no showing that it could have been), the Parsons involved every aspect of the later State case into the earlier federal trial. So vague were the Parsons' claims in each case that his Court was unable to be certain of identity of common issues until it required the Trustee to specifically itemize his State Court contentions after the trial of both cases and compared these contentions specifically with the Parsons' evidence in the federal trial. [Opinion, March 29, 1985, USDC MD ALA. No. 83V-181-N]. (2) In *ACL*, the State Trial Court entered two final judgments on somewhat different issues against defendant union, neither of which was appealed. Both appear to be final binding State judgments against the defendant, initially reviewable in the State Appellate Courts. But there was no final federal judgment on the merits of an injunction—simply a decision that no injunction was available in federal court pursuant to the Norris-LaGuardia Act. In *Parsons,* there was a federal judgment on the merits against the Parsons. (3) In *Parsons,* interlocutory orders denying motions to dismiss and for summary judgment raising the issue of the res judicata preclusion were entered by the State Court. There is no suggestion that those orders were wrong in the State proceedings then before that Court. The State of Alabama Rules, patterned on Federal Rules of Civil Procedure, provide very limited help to one seeking to protect himself from defending vague claims. The res judicata question had been presented on every occasion but was not ripe for ruling. The Defendants

sought the federal injunction as soon as they were able to crystalize the issues in both cases. This was not true in *ACL*. (4) The *Parsons* Opinion (at 884), citing *ACL*, states that the relitigation exception to the Anti-Injunction Act, "to protect or effectuate its judgments," authorizes a federal injunction of State proceedings only "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." In the instant case, the State decision, if made final, will completely emasculate the final judgment for the Bank of this Court and the United States Court of Appeals for the Eleventh Circuit. A careful comparison of the issues presented by the Parsons convinces this Court that those cases, through careful and skillful pleadings, were planned to afford the Parsons opportunities to try the same issues in two courts for damages resulting from the same set of circumstances—hence, an harassment as proscribed in *Dombroski v. Pfister*, 380 U.S. 479.

Both the majority and the dissenting opinion of justices Brennan and White in *ACL* seem to agree that a federal court has a discretion to enjoin State proceedings if it acts pursuant to an explicit exception to the prohibition of § 2283, that is, "to protect or effectuate its judgments". The majority took the view that the federal district court had decided only the Norris-LaGuardia Act question (leaving open the State questions) while the dissenters were of the opinion that the federal court had decided the union's right to picket by final judgment which was entitled to res judicata preclusive effect in the State Court enforceable by federal injunction to the parties in the State proceeding. Apart from principles of equity, comity and federalism implicitly embedded in the Anti-Injunction Act and its exceptions, either those principles played no part in that decision or the Court saw no reason to dwell upon them.

This Court is of the firm opinion that the ruling in *ACL* is not controlling of this case.

The Trustee also insists that the Supreme Court has cited *Mitchem v. Foster,* 407 U.S. 225, as a bar to this Court's proceeding in the injunction matter. This Court understands that the Supreme Court clearly mandated that this Court consider the "principles of equity, comity and federalism discussed in *Mitchem v. Foster,*" supra, at 243. Because general principles of equity, comity and federalism are not discussed at page 243 in *Mitchem,* this Court will attempt to consider the facts of the Parsons case in the light of *Mitchem* without limiting itself to the theories to which the Supreme Court may have been particularly intimating their interest by referring to page 243.

This Court understands that the Supreme Court has mandated that this Court consider the facts in this case in the light of the principles recognized in *Younger v. Harris,* infra, and its companion cases, and, perhaps, in the light of the history of *Toucey v. New York Life Ins. Co.,* infra, and the legislation resulting therefrom, all as discussed in *Mitchem.* This Court understands that, if it is to continue its injunction in force, it must walk a narrow line: The relitigation exception to the Anti-Injunction Act, as construed by the Supreme Court is limited purely to pending relitigation by the Full Faith and Credit Act; principles of equity, comity or federalism expressed in the *Younger* doctrine bars federal court injunctive interference with State Court litigation except where irreparable injury is both great and immediate, where the State law is flagrantly and patently violative of expressed constitutional prohibitions, or where there is a showing of bad faith, harassment or other unusual circumstances that would call for equitable relief. *Mitchem,* supra, at 230. This Court, so limited, may maintain an injunction to perfect or effectuate its judgment.

The *Mitchem* Court [at 237] enunciated three relevant criteria in determining whether a statutory remedy falls within an expressly authorized exception to the Anti-Injunction statute: (1) The federal law need not contain an express reference to that statute [§ 2283]; (2) a federal law need not expressly authorize an injunction of a State Court proceeding in

order to qualify as an exception; and (3) Congress must have created a specific uniquely federal right or remedy enforceable in a federal court of equity that could be frustrated if the federal court were not empowered to enjoin the State proceeding. In *Parsons,* the federal law is contained in the relitigation exception to the statute § 2283 itself; while it does not authorize an injunction specifically, it clearly allows one; and the *Parsons* Court, in discussion of the *Toucey* decision and its resulting legislation, demonstrates that Congress created a specifically and uniquely federal right or remedy enforceable in a federal court of equity that could be frustrated if the federal court were not empowered to enjoin the State Court proceeding. The *Parsons* Court, in discussing *Toucey,* made the following statement: "Congress in 1948 amended the Anti-Injunction Act to overrule this Court's decision in *Toucey* ***," *Parsons,* supra, 88 L.Ed.2d at 884; "In *Toucey* the controlling question was 'does a federal court have the power to stay a proceeding in a State Court simply because the claim in controversy has previously been adjudicated in the federal court?' " [at 126]. The *Toucey* Court concluded that, with exception not here pertinent, "proceeding in State Courts should be free from interference by federal injunction" [at 132]. The *Toucey* Court then pointed out that:

> "As part of the delicate adjustments required by our federalism, Congress has rigorously controlled the 'inferior courts' and their relation to the courts of the States," and that "Congress *** exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision" [at 141].

Parsons then points that Justice Reed's dissenting opinion suggests that, while the majority was concerned with one court's federal interference with the jurisdiction of another court [State], the true purpose of the implied relitigation exception then in effect was to preclude the parties [as distinguished from a court] from relitigating issues already decided [at 142-143].

The *Parsons'* Supreme Court's recognition that the 1948 amendment of the Anti-Injunction Act to statutorily reinstate the theretofore implied relitigation disapproved in *Toucey* would imply that the Supreme Court recognized the relitigation exception to allow a federal court to enjoin [at least, the parties in] a State Court proceeding for the purpose of effectuating the federal court's prior judgment as to the same issues between the same parties and their privies if the law of the subject State does not recognize a res judicata bar by a State Court determination.

The *Mitchem* Court also pointed out that "in *** *Perez v. Ledesma,* 401 U.S. 82, [the Court] said that 'only in cases of proven harassment or prosecutions undertaken by State officials in bad faith without hope of obtaining a valid conviction or perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending State prosecutions appropriate' [401 U.S. at 85]." *Mitchem* and other cases extended these principles to civil cases.

Equity, Comity and Federalism

Comity and federalism do not afford a one-way street. The federal courts will recognize and respect the prior exercised jurisdiction of the State Courts. 28 U.S.C. § 1738. But comity and federalism do not end there. State Courts must also recognize and respect the prior exercised jurisdiction of federal courts. Federal courts have a right and duty to protect their judgments. The Supremacy Clause [U.S. Constitution, Article VI] demands due respect of federal laws including judgments. Implicit is the fact that the first judgment in time, whether State or federal, will bar retrial of substantially the same issues (assuming concurrent jurisdiction) between substantially the same parties. The Supreme Court in *Parsons* makes clear that, if the second court to try the same cause has the records before it and is totally free to make the res judicata decision, the first court with the prior judgment can do nothing to protect its own jurisdiction, and a new series of trials and appeals must be processed in courts completely unaware of the issues involved.

In determining whether the Parsons' prosecution of the State Court case constitutes harassment or other extraordinary circumstances which would justify a federal court's rare intervention into a State Court civil proceeding, this Court must consider all the circumstances involved. The Parsons were in a steel fabrication business in Montgomery where they were financed by The First National Bank of Montgomery [the name of which has now been changed to First Alabama Bank of Montgomery]. The Parsons were having financial problems and seeking to refinance for several months and were told by the Bank that it could not continue a line of credit to them. During negotiations an officer of the Bank told the Parsons that one Mr. Orange had a record of renovating financially troubled businesses and, thereafter, Mr. Orange and the Parsons sought for several months to make a satisfactory business arrangement with forebearance of the Bank but with the understanding that the Bank would not continue the financing of the Parsons. Upon failure of the Parsons to arrange refinancing and upon receiving information that Mr. Orange could not make an agreement with the Parsons, the Bank notified the Parsons that it must insist upon satisfaction of its indebtedness. The Parsons thereupon agreed to a private sale of the mortgaged assets of the Montgomery business to Mr. Orange and filed bankruptcy which ultimately would discharge the corporate debts of the Montgomery business. Later, Parson filed two suits.

The resulting harassment and irreparable injury has been described by Justice Reed. Congress adopted as the law of the land the bulk of the dissenting Opinion of Justice Reed in *Toucey* [314 U.S. at 144]:

> "This alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the

> former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field."

Congress appeared to agree with Justice Reed that a federal court winner should not be forced to bring plea of res judicata in a State Court, "unfamiliar with the record already made," and if eventually unsuccessful seek review in the United States Supreme Court of an adverse State judgment. The Supreme Court in the case at bar expressly noted that it "fully accept[ed] the logic of Justice Reed's dissent ***" [88 L.Ed.2d at 884]. The quoted language from Justice Reed's dissent in *Toucey* is an oversimplification of the facts of, and an understatement of the harassment involved in, the *Parsons* litigation.

Remarkably, the Parsons' interests including the Trustee—Defendants here and Petitioners in the Supreme Court—did not even present for review there the federal question "of whether the courts below were correct in ultimately finding that the State Action was barred by the federal judgment under principles of res judicata and collateral esoppel ***" [brief of Parsons, p. 28, n. 20]. In fact, on October 15, 1985, the current lawyer for the Parsons' interests in this Court, Hon. Donald R. Harrison, filed an amended complaint in a State action against Parsons' earlier attorneys in this case [Bank's Exhibit 15 herein] which admitted the bar of this Court's judgment:

> "56. That both actions filed on behalf of the plaintiffs by defendants arose out of the same transaction or circumstances or were related to the same subject matter, however, the claim the State Court alleged only fraud and violations of Alabama law in connection with the foreclosure, repossession and sale of certain assets, while the Federal Action, although making allegations related to the State Action, sought only damages for violations under

Federal law of the Bank Holding Company Act, 12 U.S.C. § 1972-75 (1976).

"57. That the defendants knew or should have known of the pendents [sic] jurisdiction of the United States District Court and its original jurisdiction to hear to attendant state allegations, and knew or should have known the Federal claim along with the State claims, subject to their removal to the Federal Court upon motion of the defendants therein.

"58. That the defendants knew or should have known of the legal theories of res adjudicata [sic] and collateral estopped [sic] and that by filing said claims in two separate courts they were assuming the probability that one case would be tried before the other thereby invoking either res adjudicata [sic], and that defendants could have and should have brought and tried all claims arising from the said transaction or subject matter in one forum only." [¶¶ 56-58, Motion to Amend Complaint, *Parsons Steel v. Beasley,* CV 85-386-G].

Even after the remand by the Supreme Court in the case at bar, Mr. Harrison filed an affidavit of Parsons himself on March 10, 1986, which recognized the correctness of the holdings of this Court and of the Court of Appeals that "under [pendent] jurisdiction of the Federal Court, all could have and should have been brought in Federal Court ***."

Those documents, of course, were filed in a case wherein the Parsons are seeking $23,500,000.00 from their own attorneys in the various *Parsons v. First Alabama Bank* cases, which cases rely for their potency upon the propriety of jurisdiction of State relitigation. Nonetheless, it would appear therefrom that the parties do not question the correctness of the holding of this Court and the Court of Appeals that the judgment in the federal bank holding company actions bars the attempted relitigation in State Court of matters which were or could have been litigated

in the federal action.[10] The relevancy of this is limited by the Supreme Court's Opinion to the question of the equity of requiring relitigation under the peculiar circumstances hereof by two new courts (the third State Trial Judge and the proper Alabama Appellate Court) when this Court, the United States Court of Appeals and the United States Supreme Court have already litigated the case and are generally familiar with the issues. Equity favors the continued effectiveness of this Court's permanent injunction of June 15, 1983. It should remain in effect and the slightest undermining of it—to permit further litigation which the parties appear to concede should be barred as attempted relitigation—would mock equity and the entire judicial process.

As long as barebones pleadings are allowed, ingenious lawyers will state complaints (where sufficiently large sums are involved and both federal and State violations may arise from the same circumstances) so as to afford a trial in a federal court and a trial in a State Court both arising from the same wrong and resulting in the same damage. If damages are awarded at the first trial and if, as here, the same actual damages are claimed to have resulted from the same alleged wrongs in each case, there is no occasion to try the second case because the plaintiff would have already achieved his object. If, however, as here, the plaintiff loses the first case tried, plaintiff's attorneys will attempt to distinguish between the two causes of action, though plaintiff has been wronged only once, and will hope to convince a jury of the righteousness of their client. Complicated circumstances and allowance of vagueness in pleadings are fascinating tools of skillful attorneys in such cases. The evils arising from the practice accrue, not only against the twice tried Bank, but also against the public, the already overtaxed court system and the government itself.

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[10] The Trustee in Bankruptcy joined in the petition for certiorari filed in the Supreme Court of the United States but is not shown to be party to the State Court proceeding against Parsons' former lawyers.

Since the relitigation exception is construed to allow injunctions only before a State Court enters final judgment, if, as once suggested by the Trustee, the Bank hazards waiving its right to an injunction by not filing for an injunction before beginning the proceeding in the State Court, the relitigation exception is of little protection to an original prevailing defendant in a proceeding wherein skillful pleaders have successfully secreted their relitigation by phrasing the same issues vaguely and differently in separate suits in separate courts but, nonetheless, involving the same issues, evidence and parties. Equity and justice require that some leeway must be given a successful party in the first suit to determine identity of issues, parties, etc., before he is held to have waived his right to enjoin parties in a second similar suit.

Equitable estoppel, res judicata, relitigation and comity are necessarily closely related and are dependent upon equitable principles. One requisite of all equity is that one who seeks equity must do equity. Here, one who sought relief initially in the federal courts and failed has sought to retry his federal case in the State Court by disguising it as a State cause of action although the same issues and evidence had been fully litigated in the federal court. The Trustee, who declined to participate in the federal trial after participating in the pretrial proceedings and discovery therein, was privy to the Plaintiffs in the federal proceeding and is also, therefore, barred by equitable principles from claiming an equity in this matter.

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its companion cases, do not effect an abdication of the federal role in protecting citizens from official lawlessness or other official misconduct. Nor does it affect an abdication of a court's duty to demand respect for its judgments. The *Younger* doctrine is a simple restatement of what has long been the law, namely, that a State criminal (or civil) prosecution begun in good faith will not be enjoined, even on constitutional grounds by a federal court, except under extraordinary circumstances where the danger of irreparable injury is both great and im-

mediate. *Fenner v. Boykin,* 271 U.S. 240, 243-244 (1926); *Douglas v. City of Jeannette,* 319 U.S. 157, 163-164 (1943). In *Younger,* the Supreme Court determined that a good faith prosecution under a possibly unconstitutional statute should not be enjoined absent special circumstances. The Court based its decisions upon two grounds: Comity [the respect for the judicial processes of the States] and Equity [the existence of an adequate remedy at law—the presentation of the federal constitutional question to the State court]. 401 U.S. 37, at 43-44. A study of *Younger* demonstrates that *Dombrowski v. Pfister,* 380 U.S. 479 (1965) is still the law and that *bad faith* prosecution is the type of immediate and irreparable harm which justifies federal intervention to protect federally secured rights. 401 U.S. 37, at 48-49. See, *The Supreme Court,* 1970 Term, 85 HARVARD LAW REVIEW 40, at 301-315 (1971). Where a plaintiff seeks to enjoin the enforcement of a State law or a State Court judgment or to enjoin pending and further prosecutions pursuant thereto, and where plaintiff's allegations are sufficient to invoke the equity jurisdiction of a federal court to protect federally secured rights, a federal district court is required to examine the pleadings and proof in order to make the necessary findings on bad faith prosecution, harassment and irreparable injury prior to granting or denying the requested relief. *Dyson v. Stein,* 401 U.S. 200 (1971); *Byrne V. Karalexis,* 401 U.S. 216 (1971). This Court understands that it has done so to the extent suggested by the issues made by the parties and the Court of Appeals [unpublished Opinion #83V-181-N, March 29, 1985].

Among the pre-*Younger* cases which allowed federal court interference but recognized the doctrine, later better articulated perhaps in *Younger,* was *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In that case, the Supreme Court held that the remedy at law was inadequate and an injunction was available because of the severe penalties for violation of the law and the lengthy and difficult litigation that would be required to determine the validity of the law in a criminal proceeding. 209 U.S. at 163-165. This was the status of the law

before the *Toucey* decision and was reenacted by Congress in the relitigation exception to the Anti-Injunction Act even if that exception had no other effect.

In *Perez v. Ledesma,* 401 U.S. 82, at 85, the Court stated:

> "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate."

In *Samuels v. Mackell,* 401 U.S. 66, at 69, the Court held that federal courts should not enjoin State Court criminal prosecutions begun prior to institution of the federal suit except in very unusual situations and to prevent immediate irreparable injury.

In *Younger v. Harris,* supra, at 46, after citing cases clearly cautioning against federal injunctions against State Court criminal prosecutions, the Court mentioned the necessity for a showing of irreparable injury, both great and immediate. In explaining that requisite, the Court pointed out that the cost, anxiety and inconvenience of having to defend against a single criminal prosecution would not ordinarily involve irreparable injury and "the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution."

Here, in circumstances causing a then-plaintiff, Mr. Parsons, to say his life had been in turmoil for the first four years of these related proceedings (now extended to seven years and two trips to the Supreme Court of the United States) one can hardly conclude that anyone's rights can be determined by any "single" court proceeding. Obviously, this case is unavoidably destined, throughout State or federal lower court process, toward other proceeding in the Supreme Court of the United States. The attorneys for all parties have on one occasion discouraged this Court's certification of a doubtful State law question to the

Supreme Court of Alabama. They obviously recognize the costs, the mental and physical strain and harassment to the parties, of acquainting another court or series of courts with the facts and the law pertinent to this case.[11] They recognize the equity of proceeding in this case before judges already conversant with the problems shared by the parties. There can be no "single" proceeding to relieve the Bank and its former Vice President of the seven-year, multi-million dollar ordeal prosecuted by the Parsons who now sue their lawyers in the two trials and who now also sue the Bank in the Southern District of Alabama for matters arising from this litigation.[12] The harassment arising from these prosecutions involves irreparable injury, both great and immediate to the Bank. The multiplicity and duration of this litigation is itself an indictment of the multiple court system and of this Court. Equity, comity and federalism do not require withdrawal of this injunction.

This Court is of the opinion that the Parsons' lawyers originally filed the damage suit in the State Court for fraud and for violation of the UCC hoping to take advantage of punitive damages allowed in that proceeding. Subsequently, for fear of loss of an opportunity to litigate the circumstances as a Bank Holding Company Act violation, Parsons' attorneys filed the suit in the federal court. For fear that they would lose the opportunity to present to a jury the apparently hasty mortgage foreclosure and sale of Parsons' assets to satisfy the secured

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[11] The State Court Judge who entered the State Court judgment is now unavailable to consider the motion for judgment notwithstanding the verdict, by reason of assent to the State Criminal Court of Appeals.

[12] This Court has no knowledge of the merits or demerits of those suits. They are pending in other courts and may not be relieved by this Court.

debt,[13] the Parsons pleaded in the federal Parsons litigation all facts which they said justified the State proceeding, but they did not attempt to identify those factors as a violation of the UCC in the federal litigation. They hoped thereby to thereafter be able to litigate the same facts in the State case if they were unsuccessful in the federal case. This is, in the opinion of this Court, the exact type of "harassment or other unusual circumstances" which the relitigation exception to the Anti-Injunction Act is designed to prevent.

Accordingly, judgment will enter in favor of the Bank and the injunction will continue in force. An Order and Judgment will be entered in accordance with this Opinion.

DONE this 17th day of July, 1986.

R.E. Varner
United States District Judge

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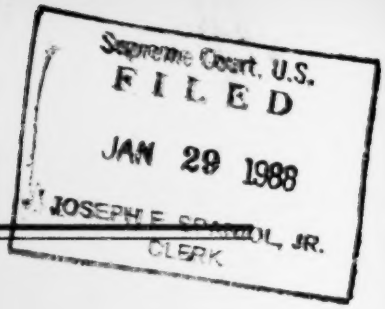
[13] To which Mr. Parsons specifically agreed.

(8)



No. 87-830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TOM MCGREGOR, TRUSTEE, ETC.,
Petitioner,

vs.

FIRST ALABAMA BANK AND EDWARD HERBERT
Respondents.

On Petition for a Writ of Certiorari to The
United States Court of Appeals For the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

M. ROLAND NACHMAN, JR.
(Counsel of Record)
BALCH & BINGHAM
P.O. Box 78
Montgomery, Alabama 36101
(205) 834-6500

JAMES A. BYRAM, JR.
STEINER, CRUM & BAKER
P.O. Box 668
Montgomery, Alabama 36104
(205) 832-8800

Attorneys for Respondents

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

The district court below decided against certain plaintiffs who had sought relief under the antitying provisions of the Bank Holding Company Act ("BHCA"), 12 U.S.C. §§ 1972-1975. Later, on June 15, 1983, that court found that these plaintiffs—and petitioner in privity with them, who knowingly elected to stay out of this federal proceeding—sought to relitigate substantially identical matters in an Alabama state court action. The district court then—acting under 28 U.S.C. § 2283 to protect and effectuate its earlier judgment—enjoined further prosecution of the state court action. The Court of Appeals affirmed. This Court reversed and remanded so that the district court could consider the *possible* preclusive effect, under Alabama law, of any state court judgment; and general principles of equity, comity and federalism.

1. Did the courts below correctly determine that no state court judgment was entitled to preclusive effect under Alabama law; and that this injunction should stand unrevised under general principles of equity, comity and federalism?

2. Did the court below correctly affirm the district court's inclusion of petitioner in its injunction upon a factual finding of privity and adequate representation?

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On Petition for a Writ of Certiorari to The
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BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 825 F.2d 1475 (11th Cir. 1987). It appears as Appendix A to the petition. The opinion of the United States District Court for the Middle District of Alabama ("District Court") of July 17, 1986 appears as Appendix B to the petition; its opinions and orders of June 15, 1983 and March 29, 1985 appear as Appendices B and C to this brief.

STATEMENT OF THE CASE

Preface

This case clearly does not warrant review by this Court as shown by the exhaustive opinion of the court of appeals below; and by the unreported decision of the district court on remand (A-23 through A-58).

This Court has already rendered a decision in this litigation, *Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518, 88 L.Ed.2d, 877 (1986). Relevant facts and the history of this litigation are fully stated there and in the opinions below, following remand. This Court reversed and remanded because the court of appeals below, in 747 F.2d 1367, refused "to consider the *possible* preclusive effect, under Alabama law, of the state court judgment." (88 L.Ed.2d at 883). (Emphasis supplied.[1] On remand, as held by the court below (825 F.2d at 1480; A-6):

> "[T]he district court found that Alabama law did not give preclusive effect to the state court's determination of the res judicata issue because there was no final judgment in that action and that an injunction was proper under principles of equity, comity and federalism. It therefore ordered that its injunction continue in force."

---

[1] 88 L.Ed.2d 884-885:

> "We hold, therefore, that the Court of Appeals erred by refusing to consider the *possible* preclusive effect, under Alabama law, of the state-court judgment. . . .
>
> We think the District Court is best situated to determine and apply Alabama preclusion law in the first instance. . . . Should the District Court conclude that the state-court judgment *is not entitled to preclusive effect* under Alabama law and the Full Faith and Credit Act, it would then be in the best position to decide the propriety of a federal-court injunction under the general principles of equity, comity and federalism discussed in *Mitchum v. Foster,* (Cit.)." (Emphasis supplied.)

The court of appeals below unanimously affirmed. Its meticulous opinion was authored by Circuit Judge Frank M. Johnson, who formerly, for at least 20 years, served as a judge of this same Alabama federal district. Moreover, Circuit Judge Hill, whose earlier dissent was noted in this Court's opinion (88 L.Ed.2d at 883), concurred in the unanimous affirmance and decision below.

Parsons Steel Industries, Inc. ("Parsons-Montgomery") and its parent corporation, Parsons Steel, Inc. ("Parsons-Mobile"), and the holders of 99% of its stock, Jim Parsons and Melba Parsons ("Parsons"), filed a complaint in state court against respondents generally concerned with Bank's foreclosure of its security interest in certain property of Parsons-Montgomery. Following the involuntary bankruptcy of Parsons-Montgomery,[2] Parsons-Mobile and Parsons filed a virtually identical complaint against Bank in federal court.[3] As the court of appeals held:

> "Viewing the federal and state actions based on the Bank's presale activities as frivolous, the Trustee declined to participate in either action. In the state court action, however, he was involuntarily joined as a party-plaintiff . . . The Trustee was aware of the federal court proceeding and was free to intervene on the bankrupt corporation's behalf. Instead, he declined to get involved because he felt the suit . . . would be a waste of money for the unsecured creditors he represents."[4]

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[2] Its successor trustee is the only petitioner here.

[3] A side-by-side comparison of the complaints appears in Appendix A of this brief.

[4] 747 F.2d at 1378-79.

BEST AVAILA

A federal judgment for Bank was affirmed, 679 F.2d 242 (11th Cir. 1982) ("*Parsons I*"). Bank pleaded the federal judgment as res judicata in state action. Motions for summary judgment raising this defense were denied. And, prior to trial on the merits, the state trial court held that the res judicata issue was a question of law to be decided by the court and not the jury. After jury verdict for plaintiffs and while post-trial motions raising again their res judicata defense were pending, respondents sought a federal injunction under 28 U.S.C. §2283 to protect and effectuate the prior federal judgment affirmed in *Parsons I.* The injunction issued, and was affirmed, 747 F.2d 1367 (11th Cir. 1984) ("*Parsons II*").

On remand,[5] the district court resolved these issues in respondents' favor (Pet., A-23), and the court below affirmed, 825 F.2d 1475 (11th Cir. 1987). (Pet., A-21) ("*Parsons IV*"). It held (825 F.2d at 1480-1481):

> "Under Alabama law, res judicata and collateral estoppel principles do not apply until there is a final judgment rendered on the merits of the case. (Citing Alabama cases).
>
> . . . [T]he district court was correct in its determination that Alabama equates finality for purposes of preclusion with appealability. . . .
>
> The judgment entered pursuant to the jury verdict in the state action in this case was not final for purposes of appeal during the pendency of the judgment n.o.v. and new trial motions."[6]

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[5] This Court's holding is quoted n.1, *supra.*

[6] Petitioner does not even present for review the question of the correctness of this holding. Without citation of authority, petitioner makes a one-sentence contention that the holding is "erroneous." (p. 13.)

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The "best position[ed]" district court also held that principles of equity, comity and federalism required the injunction (A 49-58):

> "[T]o permit further litigation which the parties appear to concede should be barred as attempted relitigation — would mock equity and the entire judicial process." (A-53).

Although the district court found that the stricter *Younger*[7] test had been satisfied, the *Parsons IV* court below held that the *Younger* principle did not apply to this civil case[8] and affirmed because respondents had made a "strong and unequivocal showing of relitigation." (825 F.2d at 1484).

In *Parsons IV*, the court of appeals also reiterated its earlier affirmance of the district court finding that the trustee was in privity with the Parsons "based on the trustee's knowledge of the federal action, with regard to which he made a deliberate choice not to intervene; the identity of the facts underlying the BHCA claim and the trustee's claim; and the fact Parsons-Montgomery was the entity primarily wronged by the alleged activities of First Alabama and thus would have been the party entitled to most of the damages." (825 F.2d at 1486.)

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[7] *Younger v. Harris*, 401 U.S. 37.

[8] "Thus it is only civil proceedings 'in which important state interests are involved' that warrant abstention under the *Younger* doctrine. . . .

* * *

. . . The state court action involved in this case was merely a private action between private parties in which the State of Alabama had no interest beyond 'its interest as adjudicator of wholly private disputes.' . . ." 825 F.2d at 1483. (quoting *Moore v. Sims*, 442 U.S. at 423 and *Pennzoil Co. v. Texaco, Inc.*, 107 S.Ct. at 1527).

Petitioner's statement is erroneous and misleading in several respects. It states (p. 3) that the earlier federal action affirmed in *Parsons I* sought no damages on behalf of Parsons-Montgomery and alleged only that Bank had placed an impermissible condition on the further extension of credit in violation of the BHCA. These errors are negated by the extensive factual recitations of the courts below. Identical complaints were filed in state and federal actions, demanding the same damages to the penny. The district court held that "an identical set of facts to those previously tried in this court" was tried in the later state proceedings, and the court of appeals approved these findings.

Petitioner erroneously contends that the state judge "ruled that the federal judgment did not bar the state action;" but fails to mention that the district court, following remand by this Court, held:

> "The State Court decided, not that the prior federal judgment did not preclude on res judicata principles a State Court's determination of the issues, but that (on motions to dismiss and for summary judgment) the pleadings and evidence then before the Court were inconclusive." Pet. A 34-35.

In a remarkable error, petitioner asserts (p. 5) that the district court "made no finding that the injunction was necessary to 'protect or effectuate' its prior judgment" and instead "based the injunction solely on its conclusion that the Federal Action barred the State Action although clearly recognizing the two actions involved different causes of action." This statement is wholly inaccurate.[9]

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[9] 747 F.2d at 1370:

> "Because the state court judgment in effect nullified the federal court judgment in favor of the Bank, the federal court, pursuant to 28 U.S.C. §2283, enjoined further prosecution of the state court action in order to protect or effectuate its prior judgment."

Finally, it is significant that only the trustee of Parsons-Montgomery seeks review of the decision below; Parsons-Mobile and the individual Parsons do not. And none has ever questioned "the correctness of the holding . . . that the [federal] judgment bars the attempted relitigation in State Court." (A-52)

REASONS FOR DENYING THE WRIT

Petitioner has failed to present any "special or important reasons" for the grant of certiorari and has failed to invoke any of the criteria specified in Supreme Court Rule 17.1(a) and (c); there is no conflict with a decision of another federal court of appeals; there is no suggested departure "from the accepted and usual course of judicial proceedings;" and the decision below accords with the applicable decision of this Court in 474 U.S. 518, 88 L.Ed.2d 877.

1. This case should end now. The courts below on remand have followed the direction of this Court and have correctly determined that no state court judgment was entitled to preclusive effect under Alabama law. Petitioner has cited — and can cite — no contrary Alabama authority. This Court should not grant review to question these determinations of Alabama law.

2. The court of appeals below followed recent and numerous decisions of this Court,[10] which have consistently held that the *Younger* principle does not apply to civil litigation unless important state interests are involved; and correctly held that the state court action in this case was merely a private action between private parties in which the State of Alabama had no interest other than as an adjudicator of private disputes. (825 F.2d at 1483).

3. Equity, Comity and Federalism. The courts below have twice determined that the injunction in this case recognized and followed almost 40 years of consistent judicial interpretation of the purpose of Congress in 1948 when it enacted the relitigation

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[10] *Pennzoil v. Texaco,* ____ U.S. ____, 95 L.Ed.2d 1, 15-17 (1987); *Ohio Civil Rights Comm. v. Dayton Schools,* ____ U.S. ____, 91 L.Ed.2d 512, 521 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Assn.,* 457 U.S. 423, 434; *Moore v. Sims,* 442 U.S. 415, 423; *Juidice v. Vail,* 430 U.S. 327, 335-36; *Trainor v. Hernandez,* 431 U.S. 434, 444; *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 611.

exception to 28 U.S.C.A. §2283. These courts applied that statute in a classic context — to effectuate the earlier judgment of the district court; to enjoin its attempted nullification by a later state court judgment; and thus to safeguard to the victor in the earlier federal litigation the fruits of that victory. This is precisely why Congress enacted this exception to §2283 in 1948 namely, to assure by express legislative language that federal courts have the power to enjoin proceedings in a state court "to protect or effectuate their judgments." As the code reviser has noted, Congress intended to adopt, by this legislation, the position of the "vigorous dissenting opinion" in *Toucey v. New York Life,* 314 U.S. 118, 144.[11]

Congress then agreed with Justice Reed that a federal court winner should not be forced to bring a plea of res judicata in a state court, "unfamiliar with the record already made," and if eventually unsuccessful seek review in this Court of an adverse state judgment. Congress and the federal judiciary, since 1948, have considered that process an inadequate remedy, and not required by any principles of comity or federalism which Congress then rejected when it overruled *Toucey.*

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[11] So characterized by Congress which adopted it when it reversed the *Toucey* decision by the enactment of §2283. This decision was criticized by the "vigorous dissenting opinion" of Justice Reed (314 U.S. at 144):

> "This alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field." (Footnotes omitted.)

This Court in this case expressly noted that it "fully accept[ed] the logic of Justice Reed's dissent. . . ." (88 L.Ed.2d at 884)

Moreover, the concerns of equity which underlie the district court's injunction are strikingly apparent. The courts below — twice after elaborate judicial treatment — have concluded that the state action was barred by the earlier federal judgment on principles of res judicata and collateral estoppel. Remarkably, the Parsons' interests and this petitioner did not even present for review in this Court the ultimate federal question[12] of the correctness of these decisions. Thereafter, and even after remand (in a state action against their attorneys), the Parsons admitted the bar of prior federal litigation. The Parsons do not now seek review here. Thus it is fair to say that the parties do not question the correctness of the repeated holdings below that the judgment in the federal action bars the attempted relitigation in state courts of matters which were or could have been litigated in the federal action.

To assert that the district court's finding of bad faith and harassment is not clearly erroneous — the test under Rule 52(a), FRCP — is to deal in understatement. This petitioner reached this Court with an opportunity to present the ultimate and pervasive substantive federal question[13] of whether the district court's prior federal judgment barred further litigation in the state courts. He and his Parsons cohorts deliberately chose not

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[12] Their brief (p. 28, n.20) expressly declined to present the federal question "of whether the courts below were correct in ultimately finding that the State Action was barred by the federal judgment under principles of res judicata and collateral estoppel. . . ."

[13] A state court's failure to give res judicata effect to a decree of a federal court raises a federal question reviewable by the Supreme Court on certiorari. Cf. *Crescent City Livestock v. Butchers Union etc. Co.*, 120 U.S. 141. See Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L.Rev. 726, 731, n. 57 (1961).

to do so. And he now argues that the only path available to Bank to secure the fruits of its earlier federal victory is to go back a third time to this Court — if this Court agrees to review the question — after a long, expensive and tortuous journey through state courts unfamiliar with the prior proceedings in either the state court or the district court. The burden of such a journey — as indeed the burden and concomitant damage of nine years of litigation — are clearly irreparable.[14]

Equity demands the continued effectiveness of the permanent federal injunction of June 15, 1983. It should remain in effect, and the slightest undermining of it—to permit further litigation which the parties concede should be barred as attempted relitigation—would mock justice and the entire judicial process. Insofar as comity may be concerned, that principle—and that of "our Federalism" which underlies it—contemplate "a system in which there is sensitivity to the legitimate interests of *both* State and National Governments...." (Emphasis supplied.)[15]

This Court, as the court below painstakingly demonstrated,[16] has repeatedly explained that the so-called *Younger* doctrine

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[14] A contrary demonstration of good faith was exemplified in *Sosna v. Iowa,* 419 U.S. 393, 396, n.3:

> "Our request that the parties address themselves to *Younger v. Harris,* (Cit.) and related cases, indicated our concern as to whether either this Court or the District Court should reach the merits of the constitutional issue presented by the parties in light of appellant Sosna's failure to appeal the adverse ruling of the [Iowa state trial court] through the state appellate network. In response to our request, both parties urged that we reach the merits of appellant's constitutional attack on Iowa's durational residency requirement."

[15] *Younger v. Harris,* 401 U.S. 37, 44, cited in *Mitchum v. Foster,* 407 U.S. 225, 243, cited in turn by this Court in the case at bar, 88 L.Ed.2d at 885.

[16] See discussion, *supra,* p. 8.

does not apply to all ongoing state civil proceedings. Chief Justice Rehnquist—the author of the decision at bar—wrote pointedly in *Moore v. Sims,* 442 U.S. 415, 423, n. 8, that "contrary to the suggestion of the dissent, we do not remotely suggest 'that every pending proceeding between a State and a federal plaintiff justifies abstention unless one of the exceptions to Younger applies.' "[17]

The best positioned courts below have twice held that Bank has made a strong and unequivocal showing of relitigation. It need show no more to preserve its federal injunction.

It is difficult to understand the trustee's argument regarding *A.C.L.R. Co. v. Brotherhood,* 398 U.S. 281. The court below—in an exhaustive analysis—rejected it. Surely trustee does not suggest that A.C.L. is dispositive and requires dissolution of this federal injunction. Obviously, this Court did not dispose of this case on that basis but remanded to the district court as the one best positioned to determine the issues which this Court held to be dispositive, namely, Alabama preclusivity and considerations of equity, comity and federalism.[18]

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[17] *A fortiori* the *Younger* doctrine does not apply to state civil proceedings in which the state itself is not a party and which involve only private litigants.

[18] Moreover, petitioner's analysis of *A.C.L.* is flawed. In that case Justice Black, for the majority, and dissenting Justices Brennan and White agreed that a federal district court could enjoin a later state judgment in order to "protect or effectuate" an earlier federal judgment. Although "[p]roceedings in state courts should *normally* be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court,..." the majority opinion recognized that § 2283 was an exception to this principle when federal intervention by a district court was necessary "to protect or effectuate" an earlier judgment of that federal court. (398 U.S. at 287; emphasis supplied.)

The courts below have again correctly determined that equity, comity and federalism require the continuation of the injunction in force.[19]

The majority in *ACL* held that the later federal injunction was precipitated by a supervening decision of this Court, and was not an effort by the federal district court to protect or effectuate an earlier judgment—a judgment which the majority found to have been based on the Norris-LaGuardia Act's withdrawal of "jurisdiction" of a federal court to issue an injunction in that labor dispute. 29 U.S.C. §101. Thus, there was no decision on the merits. The dissenters disagreed and were of the opinion that the district court had, indeed, acted to protect or effectuate its earlier judgment—a judgment which "obviously decided considerably more than the threshold question of whether the Norris-LaGuardia Act withdrew jurisdiction to grant federal injunctive relief in the circumstances of this case." (389 U.S. at 299)

[19] Petitioner erroneously argues that the relitigation exception in Sec. 2283 was not intended by Congress to allow the issuance of a federal court injunction where the later state court action involved claims which could have been, but were not actually litigated in the prior federal section.

This contention is at war with the facts of the Iowa Bridge case in *Toucey*. There, the federal injunction issued because the earlier federal judgment was "an absolute bar to the prosecution of the second action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Phoenix Financial Corp. v. Iowa-Wis. Bridge Co.*, 115 F.2d 1, 6 (8th Cir. 1940).

This contention conflicts with Justice Reed's dissent in *Toucey*, which begins (314 U.S. at 141-142):

> "The controlling issue in both the *Toucey* and the *Phoenix Finance Corp.* cases is the power of a federal court to protect those who have obtained its decrees against an effort to force relitigation of the *same causes of action* in the state courts." (Emphasis supplied.)

4. The petition impermissibly seeks to present a due process argument never articulated in the courts below; the argument itself has no merit; and the petition simply seeks a review here of repeated factual findings.

The court below, as the district court, held that as to facts relating to BHCA and fraud claims, "the Trustee is in privity with the Parsons as to the adjudication of those facts and is bound by the federal adjudication of those matters."[20] See *Montana v. United States,* 440 U.S. 147. The court below also affirmed the district court's finding that trustee's UCC claim was based on the same alleged improprieties.[21] Indeed, a case cited by petitioner, *General Foods v. Mass. Dept. of Health,* 648 F.2d 784, 787 (1st Cir. 1981), enunciates the appropriate test that due process permits a nonparty to be bound by a judgment if "he had directly or vicariously a full and fair opportunity to present evidence and argument." Petitioner's other cases apply this test and also hold questions of privity and adequate representation to be fact issues. The court below for a second

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And the contention is squarely contrary to uniform holdings of most courts of appeals: the two holdings of the court below and those of this circuit on which it relied; *Harper Plastics v. Amoco Chemicals,* 657 F.2d 939, 945 (7th Cir. 1981); *Ennis v. Woodmar Realty Co.,* 542 F.2d 45, 49 (7th Cir. 1976); *Donelon v. New Orleans Term Co.,* 474 F.2d 1108, 1113 (5th Cir. 1973); *Brown v. McCormick,* 608 F.2d 410, 416 (10th Cir. 1979); *Silcox v. United Trucking Services,* 687 F.2d 848, 853 (6th Cir. 1982); *U.S. v. District of Columbia,* 654 F.2d 802, 810, n.19 (D.C. Cir. 1981); *Allied Mut. Ins. Co. v. Roberson,* 306 F.2d 130, 133 (4th Cir. 1962); *Wood v. Santa Barbara Chamber of Commerce,* 705 F.2d 1515, 1524 (9th Cir. 1983).

[20] 747 F.2d at 1380; reiterated in *Parsons IV,* 825 F.2d at 1486.

[21] 825 F.2d at 1487-88. When, upon court order the trustee stated his UCC claim with specificity, "the district court did not err in finding that all of these facts related to the pre-sale actions of [Bank]." *Ibid.*

time approved the district court's finding. (825 F.2d at 1486); quoted p.6, *supra*)[22]

Moreover, Trustee was in fact adequately represented in the federal action; was in privity with the other Parsons plaintiffs there; and is bound as they are by the results of the federal action as to matters which were raised and decided and as to matters which were not, but could have been. *Nevada v. United States,* 463 U.S. 110, 129-130.[23]

Surely, this Court will not now seek to review findings of fact—made twice by the trial and appellate courts below—that Parsons-Montgomery and its Trustee were adequately represented in the prior litigation. Its parent corporation, Parsons-Mobile, and the holders of 99% of the stock of the parent, were parties in federal action.[24] Trustee joined in the pleadings of the other plaintiffs, and throughout the state ac-

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[22] Its earlier affirmance had stated: (747 F.2d at 1379):

> " 'The trustee was well aware of these proceedings (the prior federal action) and made no effort to intervene as an interested party. *** Under these circumstances, the trustee cannot complain that he lacked a full and fair opportunity to litigate the issue in question at the federal district court proceeding. Collateral estoppel thus precludes the trustee from relitigating this issue.' *Four Corners, supra,* at 160."

[23] "Simply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, [i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac,* 94 US 351, 352...." *See, also, Southwest Airlines Co. v. Texas,* 546 F.2d 84, 94-95 (5th Cir. 1977):

> "[F]ederal courts have repeatedly held that judgments can bind persons not party to the litigation in question."

[24] See *Kraeger v. General Electric,* 497 F.2d 468 (2d Cir. 1974), *cert. denied* 419 U.S. 61, which held that the sole stockholder of a corporation was bound by the dismissal of an earlier action brought in the name of the corporation.

tion, took positions in that case consistent with the individual Parsons and Parsons-Mobile.

The complaints in both cases alleged identical wrongs and sought identical damages. Petitioner cannot contend that parent Parsons corporation, asking for $2,419,945.89 for diminution of the value of its stock in the bankrupt subsidiary, was entitled to one recovery of this sum for damages arising out of a commercially unreasonably sale of the assets of subsidiary; and that the trustee of the bankrupt subsidiary would be entitled to another identical recovery on behalf of the subsidiary. The court below has twice correctly held that the damages sought against Bank in federal action specifically involved alleged damages to the wholly owned subsidiary as a proximate result of the alleged dealings between Bank and its debtor, the subsidiary; and that the bankrupt subsidiary, and thus its trustee, was the primary, if not sole party damaged by the alleged violation of the Bank Holding Company Action.

Indeed, there are litmus tests that trustee and his state action lawyers considered representation by the Parsons and their lawyers to be completely adequate. The witness list submitted by trustee in state action[23] not only specified all persons who testified in federal action and in depositions taken in that action; but as to the very state action, trustee designated "any witness listed by co-plaintiffs [Parsons in state action]." In

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[23] Plaintiffs' Exhibit 4 of Joint Appendix, p.186 in former proceedings here ("JA").

argument to the jury, counsel for trustee adopted the arguments of attorneys for the Parsons.[26]

All of these facts compelled the repeated findings of the courts below that the Parsons — and their parent corporation — owners of all proprietary interest in a subsidiary said to have been injured by Bank — adequately represented the interests of the subsidiary in the federal action — "primary if not sole" interests alleged to have been damaged by the acts and omissions of Bank. Trustee "had directly or vicariously a full and fair opportunity to present evidence and argument."[27]

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[26] In his opening statement to the jury in state action, an argument comprising one transcribed page, counsel for trustee, "in the interest of time" adopted Parsons' counsel's "statement of what we expect the evidence to show." (JA 338) In his closing argument to the jury, counsel for trustee stated: "I come to you behind [counsel for Parsons] who has stated the evidence to you as I have seen it." (JA 339) The Parsons' jury argument in federal action paralleled trustee's jury argument in state action.

Federal argument:

> "[Mr. Orange] got the land, he got all of the assets, all of the coils . . . all of the equipment; everything out there. They shut out, effectively, the unsecured creditors. That is out, at this point. But they got a valuable piece of property, they got a good business; they get the Parsons' business. And they are going to tell you that Mr. Parsons benefitted from this arrangement. They are going to try to tell you that Mr. Parsons actually dreamed this scheme up." (JA 198)

Significantly, the lawyer for trustee argued in state action:

> "Let me talk to you just briefly about the commercial unreasonableness . . . first thing in January, January 5, you got them figuring out how to walk away with all the goodies and leave the unsecured creditors and Parsons-Montgomery out in the cold. . . .. There was only one bidder there. One person, one buyer. It was all prearranged. It was done in secret. It was done in a hidden fashion. . . . They handled it quietly. They say Jim Parsons waived notice, . . . They didn't want anybody else there. They were going to sell it to Michael Orange. They made that decision way back on the 10th or the 11th." (JA 330-331)

[27] *General Foods v. Mass. Dept. of Health, supra,* p. 14.

CONCLUSION

Accordingly, petitioner has failed to advance any reason for the grant of certiorari and, for the foregoing reasons, it is respectfully submitted that his petition should be denied.

Respectfully submitted,

M. ROLAND NACHMAN, JR.
P.O. Box 78
Montgomery, Alabama 36101

Counsel of Record for Respondents

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Respondents in Opposition upon counsel of record for Petitioner by depositing a copy in the United States mail, postage prepaid, addressed as follows:

James Jerry Wood, Esq.
641 South Lawrence Street
Montgomery, Alabama 36104

this 29th day of January, 1988.

M. Roland Nachman, Jr.

APPENDIX

APPENDIX A

COMPARISON OF CORRESPONDING PARAGRAPHS OF STATE AND FEDERAL COMPLAINT

State Complaint	Federal Complaint
12. For a substantial period of time prior to November 30, 1978, "First Alabama" loaned "Industries" a considerable amount of money for operating and other purposes in its business. "Industries" in turn executed security agreements to "First Alabama" on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did "Industries" refuse to pay or fail to pay any of its indebtedness to "First Alabama." During the life of said loans "First Alabama," acting by and through its agents, servants, or employees, including "Herbert," advised and consulted with "Industries" in its business operation and management. "Herbert" personally took over the handling of said loans on a date prior to November 30 in the year 1978 due to the fact that the employee of the bank handling the loans left the employ-	12. For a substantial period of time prior to November 30, 1978, Defendant loaned Subsidiary a considerable amount of money for operating and other purposes in its business. Subsidiary, in turn, executed security agreements to Defendant on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did Subsidiary refuse to pay, or fail to pay, any of its indebtedness to Defendant. During the life of said loans, Defendant, acting by and through its agents, servants, or employees, advised and consulted with Subsidiary in its business operation and management. A Senior Vice President, Edward Herbert, personally took over the handling of said loans on a date prior to November 30, 1978, due to the fact that the employee of the bank handling the loans left the employment of Defendant. Subsequent to said date, Mr.

State Complaint	Federal Complaint
ment of "First Alabama." Subsequent to said date, "Herbert" advised and counselled with "Parsons" concerning the operation and management of "Industries."	Herbert advised and cousellled with Subsidiary concerning the operation and management of Subsidiary.
14. On a later date and prior to November 30, 1978, "Herbert" again approached "Parsons" with a request that he enter into negotiations with another prospective purchaser, namely, "Orange." Shortly thereafter "Orange" came to "Industries' " location and looked over the operation. "Orange" later indicated to "Parsons" that he was not interested in purchasing the business, but planned to take over the management of "Industries" at the request and under the direction of "First Alabama" and "Herbert."	13. On a date prior to November 30, 1978, Defendant acting by and through its officer, agent, and employee, Herbert, approached Subsidiary with a request that negotiations be undertaken by Subsidiary with a prospective purchaser, namely Michael Orange. Shortly thereafter, Mr. Orange came to Subsidiary's business location and looked over the operation. Mr. Orange later indicated to Subsidiary that he was not interested in purchasing the business, but planned to take over the management of the company at the request and under the direction of Defendant.
13. Subsequent to the events alleged in paragraph 14, a local attorney, namely Samuel Kaufman, at the direction of "Herbert" and "Orange" was employed to represent "Industries" to bring about a proposed composition of creditors.	14. Subsequent to the events alleged in paragraph 13 above, a local attorney, namely Samuel Kaufman, at the direction of Defendant and Mr. Orange, was employed to represent Subsidiary to bring about a proposed composition

State Complaint	Federal Complaint
"Herbert" instructed "Parsons" to secure a certified audit of the assets and liabilities of "Industries" for distribution to all creditors of "Industries." "Parsons" then employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with "Herbert's" instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by "Industries." A balance sheet on "Industries" was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to "Orange." This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. "Orange" and "Herbert" refused to use this information and instead supplied information to Kaufman reducing the total assets of "Industries" from $2,384,945.89 to $1,034,000.00	of creditors. Defendant instructed Subsidiary to secure a certified audit of the assets and liabilities of the company for distribution to all of its creditors. Subsidiary had employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with Defendant's instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by Subsidiary. A balance sheet on Subsidiary was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to Mr. Orange. This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. Mr. Orange and Mr. Herbert refused to use this information and instead supplied information to Attorney Kaufman reducing the total assets of Subsidiary from $2,384,945.89 to $1,034,000.00

State Complaint	Federal Complaint
16. On or about December 14, 1978, "Orange" became Chief Executive Officer of "Industries" on the direct insistance of "First Alabama" and "Herbert." At said time, at the request of "Herbert," "Parsons" resigned as President of "Industries."	15. On or about December 14, 1978, Mr. Orange became Chief Executive Officer of Subsidiary on the direct insistance of Defendant, as a condition of Defendant's renewing Subsidiary's loans and extending operating loans, letters of credit, etc., in the future. At the request of Defendant, Jim D. Parsons resigned as President of Subsidiary as a further condition of credit by Defendant.
17. There was no significant change in the assets or inventory maintained by "Industries," nor in the liabilities of said company from November 27, 1978 to January 17, 1979.	16. There was not significant change in the assets or inventory maintained by Subsidiary nor in the liabilities of said company from November 27, 1978 to January 17, 1979.
18. Attorney Kaufman, at the request of "Orange" and "Herbert," sent a letter to all creditors of "Industries" dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by "Orange" with the overt concurrence of "Herbert." The proposal, mailed to all creditors, listed the assets of "Industries" at	17. Attorney Kaufman, at the request of Mr. Orange and Defendant sent a letter to all creditors of Subsidiary dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by Mr. Orange and Defendant. The proposal, mailed to all creditors, listed the assets of Subsidiary as "approximately $1,034,000.00" with liabilities

State Complaint	Federal Complaint
"approximately $1,034,000.00" with liablities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of "Industries," and stated further that "First Alabama" held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that "First Alabama" had refused to continue to carry "Industries' " loans unless "Industries" brought in new management, and further that "First Alabama" located "Orange" to fill this newly created management role. The proposal stated further that "First Alabama" conditioned restructuring of the existing debt of "Industries" upon acceptance of "Orange" to assume the position of President and Chief Executive Officer of "Industries" and that "Orange" had already assumed the management of "Industries." The proposal stated further that "Parsons" had resigned as President and Chief Executive Officer of	of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of Subsidiary, and stated further that Defendant held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that Defendant had refused to continue to carry Subsidiary's loans unless Subsidiary brought in new management, and further that Defendant located Mr. Orange to fill this newly created management role. The proposal stated further that Defendant conditioned restructuring of the existing debt of Subsidiary upon acceptance of Mr. Orange by Subsidiary to assume the position of President and Chief Executive Officer of Subsidiary, and that Mr. Orange had already assumed the management of Subsidiary. The proposal stated further that Jim D. Parsons had resigned as President and Chief Executive Officer of Subsidiary and that Mr.

State Complaint	Federal Complaint
"Industries" and that "Orange" had replaced him, and further, that "Parsons' " salary had been reduced by 50 percent and that he would continue to work with the company as Sales Manager under the direction and control of "Orange."	Orange had replaced him, and further, that Jim D. Parsons' salary had been reduced by 50 percent and that Mr. Orange would have full direction and control over Subsidiary.
19. The above proposal stated that "Industries" had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that "Industries" could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and the manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.	18. The above proposal stated that Subsidiary had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that Subsidiary could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and that manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.
20. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of "Industries" to its	19. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of Subsidiary to its

State Complaint

creditors, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978.

21. A relatively small number of the creditors of "Industries" accepted the proposal submitted to them. At no time did "Parsons," or any employee, officer or director of "Industries," with the exception of "Orange," agree to the proposed composition of creditors, nor the approach taken. In fact, "Parsons" repeatedly told "Orange" and "Herbert" that it would not work and would be a financial disaster for "Industries" and that the creditors simply wouldn't buy the proposal. "Orange" and "Herbert" refused to listen to "Parsons" and placed him him in a subordinate position in the operation and management of the company as shown by the Kaufman proposal and the actual day-to-day operations at

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creditors, by Defendant and Mr. Orange, knowing the same to be false and misleading in several respects. portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978. A relatively small number of the creditors of Subsidiary accepted the proposal submitted to them. At no time did Parent agree to the proposed composition of creditors, nor the approach taken. In fact, Jim D. Parsons repeatedly told Mr. Orange and Mr. Herbert that it would not work and would be a financial disaster for Subsidiary, and that the creditors simply wouldn't buy the proposal. Mr. Orange and Mr. Herbert placed Jim D. Parsons in a subordinate position in the operation and management of Subsidiary, as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise. Defendant, acting by and through its officer, agent, and employee Mr. Herbert, because of its posi-

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the plant site and otherwise. The Defendant "First Alabama," acting by and through its officer, agent, and employee "Herbert," because of its position, exercised almost total control over "Parsons" and "Industries" at this time.	tion of power, exercise total control over Subsidiary at this time.
22. The information supplied by Attorney Kaufman, at the request and under the direction of "Orange" and "Herbert," and subsequently mailed to all creditors of "Industries," was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of "Industries" to the creditors. Defendants "Orange" and "Herbert," individually, and as an officer, agent, or servant of "First Alabama," knew the information suppled to creditors to be false and misleading, and, by their active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.	20. The information supplied by Attorney Kaufman, at the request and under the direction of Mr. Orange and Mr. Herbert, and subsequently mailed to all creditors of Subsidiary, was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of Subsidiary to the creditors. Defendant knew the information supplied to creditors to be false and misleading, and, by its active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.

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23. On a date in January of 1979, prior to January 9, when it became evident that the creditors would not accept the proposed composition, "Herbert" advised "Parsons" in a private conversation that the Bank would no longer finance the business operations of "Industries," nor would "Industries" be given additional time to secure other financing from other sources. On or about January 9, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all of the indebtedness of "Industries" would be due and payable on January 15, 1979, and that no additional time would be given to said company. The amount of the total indebtedness owed by "Industries" was stated to be $1,076,486.00 in principal with $33,925.13 interest as of said date.	21. On January 9, 1979, Defendant advised Jim D. Parsons that Defendant would no longer finance the business operations of Subsidiary, nor would Subsidiary be given additional time to secure other financing from other sources. On or about January 9, 1979, Defendant notified Subsidiary that all of its indebtedness to Defendant, stated as $1,076,486.00 in principal with $33,925.13 interest, would be due and payable on January 15, 1979, and that no additonal time would be given to said company.
24. On or about January 11, 1979, "Orange" notified "Parsons" in writing that he was rescinding their agreement and that his working with "Industries" was not serving any purpose, which in effect gave	22. On or about January 11, 1979, Mr. Orange notified Jim D. Parsons that he (Mr. Orange) would "cancel" his agreement with Subsidiary (his resignation required six months to take effect) and,

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notice that "Orange" would "cancel" his agreement with "Industries" which required six months to take effect and, thus, resign as Chief Executive Officer at the expiration of the stated time.	thus, resign as Chief Executive Officer.
25. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all assets secured under the security agreements were being taken in and that physical possession would be taken by "First Alabama" on said date.	23. On or about January 15, 1979, Defendant notified Subsidiary that all assets secured under the security agreements were being taken in and that physical possession would be taken by Defendant on said date. On or about January 15, 1979, Defendant notified Subsidiary that Defendant would sell all collateral security to satisfy the aforesaid loans at Mr. Herbert's office on January 17, 1979 at 2:00 p.m.
26. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that "First Alabama" would sell all collateral security to satisfy the aforesaid loans at "Herbert's" office on January 17, 1979, at 2:00 p.m.	
27. On or about January 17, 1979, a private sale of the assets of "Industries" was made by "First Alabama" to "OSI," at 10:00 a.m. (two hours prior to the notice time), which purported to convey all rights and title in and to the	24. On or about January 17, 1979, a private sale of the assets of Subsidiary was made by Defendant to OSI, Inc., at 10:00 a.m. (four hours prior to the notice time), which purported to convey all rights and title in and to the said property

State Complaint	Federal Complaint
said property and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by "First Alabama" to "OSI" on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,252.65 certain described personal property of "Industries."	and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by Defendant to OSI, Inc. on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,352.65 certain described personal property of Subsidiary.
28. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, "Herbert" and "Orange" were working in concert to acquire the business owned and operated by "Industries" in Montgomery County, Alabama for "Orange." The methods by which "Orange" took possession and obtained title to the assets and properties of "Industries" could never have happened as it did without the active participation and assistance of "Herbert," an officer, agent, and employee of "First Alabama."	25. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, Mr. Herbert and Mr. Orange were working in concert to acquire the business owned and operated by Subsidiary in Montgomery County, Alabama for Mr. Orange. The methods by which Mr. Orange took possession and obtained title to the assets and properties of Subsidiary could never have happened as it did without the active participation and assistance of Mr. Herbert, a key officer, agent, and employee of Defendant.
29. The relationship between "Herbert" and "First" Alabama" was, at all times pertinent hereto, that of agent	26. The relationship between Mr. Herbert and Defendant was, at all times pertinent hereto, that of agent and prin-

State Complaint	Federal Complaint
and principal; the relationship between "First Alabama" and "Industries" was, at all times pertinent hereto, much more than that of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between "Orange" and "Industries" as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and/or agent and principal. Both "Herbert" and "Orange" owed certain duties and responsibilities to their respective employers, the stockholders of both "First Alabama" and Industries," and to all parties Plaintiff hereto. Their special relationship with "Industries" provided them with certain valuable confidential and insider-type information that only a person in their respective positions could have obtained concerning the operations of the business of "Industries," its	cipal; the relationship between Defendant and Subsidiary was, at all times pertinent hereto, much more than that of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between Mr. Orange and Subsidiary as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and or agent and principal. The special relationship of Mr. Herbert and Mr. Orange with Subsidiary provided them with certain valuable confidential and insider-type information that only persons in their respective positions could have obtained concerning the operations of the business of Subsidiary, its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

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assests and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.	
30. The sale of the assets of "Industries" to "OSI," a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of "Industries," was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by "OSI" being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor was the property and assets sold for the fair market value thereof. The letter from "Herbert," on behalf of "First Alabama," dated January 15, 1979, to "Par-	27. The sale of the assets of Subsidiary by Defendant to OSI, Inc., a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of Subsidiary, was not handled in a commercially reasonable manner, in that acquisition and sales of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms, who could have been purchasers, were given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor were the property and assets sold for the fair market value thereof.

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sons" giving notice of the aforesaid private sale actually gave notice of sale to "Standard Steel Building Systems, Inc." and not a sale to "OSI." This notice was given and received by the parties thereto on January 15, 1979. At said date, "Parsons" was required by "Herbert" to sign a letter which had been prepared by "Herbert" (or at his discretion) which was explained by "Herbert" and purported to be a Waiver of Notice.	
31. On or about the 2nd day of January, 1979, and at all times thereafter, "Herbert" put great pressure on "Parsons" to require "Industries" to either (a) pay the indebtedness in full or (b) put "First Alabama" in possession of the assets and properties of "Industries" which would have put "Industries" out of business. At no time prior to said date had "Herbert," nor any other person on behalf of "First Alabama," given any indication that "First Alabama" would discontinue financial arrangements with "In-	28. On or about the 2nd day of January, 1979, and at all material times thereafter, Defendant put great pressure on Subsidiary to require Subsidiary to either (a) pay the indebtedness in full or (b) put Defendant in possession of the assets and properties of Subsidiary which would have put the corporation out of business. At no time prior to said date had Defendant given any indication that it would discontinue financial arrangements with Subsidiary. In fact, Jim D. Parsons had been led to believe that Defendant would renew all of said

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dustries" and/or "Parsons." In fact, "Parsons" had been led to believe that "First Alabama" would renew all of said loans and continue to finance "Industries" operations.	loans and continue to finance the corporation's operations. Defendant made many unsecured loans to Jim D. Parsons at interest rates as low as 5% just prior to the above takeover.
32. The Defendant "First Alabama," acting by and through its officers, agents, or employees, including "Herbert," the Defendant "Herbert," individually, and as an officer, agent, or employee of "First Alabama," the Defenddant "OSI," acting by and through its officers, agents, or employees, including "Orange," the Defendant "Orange," acting individually and as an officer, agent, or employee of "OSI," actively participated in the scheme described hereinabove to take over the operation of the business affairs of "Industries," including its assets and properties which amounted to collusion between said Defendants to do great damage and economic harm to Plaintiffs and which effectively put "Industries" out of business for all practical purposes.	29. Defendant, acting by and through its officers, agents, or employees, including Mr. Herbert, actively participated in the scheme described hereinabove to take over the operation of the business affairs of Subsidiary including its assets and properties which amounted to collusion between said Defendant and others, including Mr. Orange, to do great damage and economic harm to Plaintiffs and which effectively put Subsidiary out of business.

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36. Subsequently, "First Alabama," acting by and through "Herbert," took possession of the ongoing business operations of "Industries," as set out hereinabove, taking and selling all assets and properties of said corporation.	32. Subsequently, Defendant took possession of the ongoing business operations of Subsidiary as set out hereinabove, taking and selling all assets and properties of said corporation on January 17, 1979, at a private sale to OSI, Inc., a newly formed corporation

Excerpts From Relief Sought:

State	Federal
38. As a direct and proximate result and consequence of the acts of the Defendants described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:	40. As a direct and proximate result and consequence of the acts of the Defendant described hereinabove, which violated Title 12, U.S.C.A. §1971, et seq., the Plaintiffs, separately and severally, suffered and sustained the following damages:
a. Plaintiffs, individually and separetely, sustained great damage to their general reputation in the business community, which prior thereto had been good.	a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.
b. Plaintiffs "Industries" and "Steel" sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February	b. Plaintiff, Parent, sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for

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which has expired, and they will suffer such losses in the future.

c. Plaintiff "Industries" sustained the loss of all of its assets and properties taken and now claimed by "First Alabama" and/or "OSI" in the value of $2,419,945.89.

d. Plaintiff "Steel" sustained a severe loss due to the serious decline in its own sales and collections due to the problems associated with the aforesaid takeover of "Industries" by defendants.

e. Plaintiff "Steel," as a result of defendants acts and actions, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable, was forced to pay over to defendant "First Alabama" as a result of its personal guarantee real property with an appraised market value in excess of

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that portion of the month of February which has expired, and they will suffer such losses in the future: the value of its stock in Subsidiary was rendered worthless and of no value (Subsidiary had assets and properties valued at approximately $2,419,945.89. as of January 17, 1979).

c. Plaintiff, Parent, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on account receivable; and, it was forced to pay over to Defendant as a result of its personal guarantee real property with an appraised market value of $1,003,000.00, losing title to the real estate as described hereinabove.

d. Plaintiff Jim D. Parsons, lost a good job, has been caused great worry, stress, mental anguish, and has been harrassed by Defendant since the 11th day of January, 1979, all to his

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$950,000.00 losing title to the real estate as described hereinabove.	great damage and detriment.
f. Plaintiff "Parsons," has been caused great worry, stress, mental anguish, and has been harrassed by defendants since the 11th day of January, 1979, all to his great damage and detriment.	e. Plaintiff Melba E. Parsons has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by Defendant since the 11th day of January, 1979, her stock in Parent has greatly diminished in value, all to her great damage and detriment.
g. Plaintiff "Mrs. Parsons" has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by defendants since the 11th day of January, 1979, all to her great damage and detriment.	f. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.
h. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.	

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83-V-181-N

First Alabama Bank of Montgomery, N.A.; et al,
Plaintiffs,

vs.

Parsons Steel, Inc.; et al,
Defendants.

OPINION

This cause is submitted on the pleadings and evidence before the Court for an injunction against prosecution of a judgment and proceeding in the Courts of the State of Alabama on the bases of res judicata and collateral estoppel. Plaintiffs, First Alabama Bank and its Vice-President Edward Herbert, insist that this Court has heretofore found in favor of Plaintiff Bank [Defendant in an earlier suit in this Court, *Parsons Steel, Inc., et al v. First Alabama Bank of Montgomery, N.A.*, 679 F.2d 242 (11th Cir. 1982)] based on substantially the same factual allegations and that some Defendants herein [Plaintiffs in the prior suit in this Court and in the current State Court suit] sought to split their causes of action and sue in the federal court for violation of the Bank Holding Company Act [12 U.S.C. §§ 1971, *et seq.*] and in the State court for common law fraud and commercial unreasonableness. The federal court action proceeded to the earlier judgment, the same being in favor of Defendant Bank, and the State court action resulted in a judgment for the assorted Plaintiffs for $4,000,001.00 against the Defendants. The State court action is now pending before State appellate courts. The Plaintiffs insist that this Court, pursuant

to 28 U.S.C. § 2283, has jurisdiction and should exercise the same to protect or effectuate their judgment. The Defendants insist that 28 U.S.C. § 2283 proscribes this suit.

Authorities are well documented that identical parties may not relitigate identical issues in separate courts. A very large part of the costs of litigation is on the public, and the courts, as well as the public, are interested in avoiding multiplicity of litigation under the doctrine of res judicata and other principles of law. This does not mean that every cause of action in existence between parties must necessarily be litigated at the same time. See, *Bragg v. Jim Skinner Ford,* 17 A.B.R. 1412, indicating that purchaser of a car might sue in separate lawsuits for failure to disclose financing terms under the Truth-in-Lending Act, 15 U.S.C. § 1631, and later sue for breach of warranties on the sale of the automobile. However, as pointed out by the United States Court of Appeals for the Fifth Circuit in *Meridian Investing & Dev. Corp. v. Sunco Highland Corp.,* 628 F.2d 370, 372, a federal district court "may not abdicate its authority or duty in favor of State jurisdiction," even though federal courts are most reluctant to encroach on State court jurisdiction. See, also, *Ermentrout v. Commonwealth Oil Co.,* 220 F.2d 527, 530 (5th Cir. 1955). In short, it is clear that the same causes of action may not be litigated a second time between the same parties after final judgment on one or the other proceedings.

A slightly different question arises in a situation where different causes of action arising from the same factual circumstances are alleged in a second suit. The United States Court of Appeals for the Fifth Circuit seems to clearly answer this proposition in *Woods Exploration & Tro. co. v. Aluminum Co. of America,* 438 F.2d 1286, 1315 (5th Cir. 1971), cert.den. 404 U.S. 1047 (1972):

> "The principle of res judicata, enforceable by injunction, would thus preclude relitigation in the state following this

> federal judgment if the state and federal courts involve substantially the same wrongs measured by similar standards of liability so that recovery in the federal suit will have compensated plaintiffs for the total harm suffered ***. Alternatively, even if different standards of recovery existed in the state and federal actions, res judicata would be applicable if plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings ***. Focusing on the latter test, we think that the doctrine of pendent jurisdiction *** afforded plaintiffs opportunity for joinder."

As articulated in *Harper Plastics v. Amoco Chemical Corp.*, 657 F.2d 939, 945 (7th Cir. 1981), "res judicata operates to prevent the splitting of a single cause of action and the use of several grounds of recovery under the same action as the basis for separate suits." See, also, *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 320 (1926), recognizing that there must be an end to litigation. Plaintiffs in the original suit in this Court sued under the Bank Holding Company Act and proceeded to attempt to show that the Bank, by promising unlimited credit, induced the various Parsons entities to overextend their credit; that the Bank on threat of denying further credit forced Parsons Montgomery to employ Orange as manager; and that, thereafter, the Bank foreclosed its mortgage on Parsons' property and sold for commercially unreasonable prices.[1] The promise to finance, offered as evidence of the preamble to the alleg-

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[1] Plaintiffs' objective was to show that the Bank required unusual services or actions of the creditor as a condition of making a loan, all being in violation of the Bank Holding Company Act. Plaintiffs insisted that the unusual services required were that Mr. Orange, a former customer of the Bank, be employed as manager of Parsons Montgomery and that he be given a right to buy controlling ownership of the corporation. This Court, and ultimately the Court of Appeals for the Eleventh Circuit, concluded that the Bank had not required any unusual banking practice, and judgment was entered for the Bank.

ed Bank Holding Company Act violation in federal court, is alleged as a fraud in the State court. The mortgage foreclosure sale for commercially unreasonable prices appeared in the federal case as evidence of damages and in the State case as a violation of CODE OF ALABAMA, §§ 7-9-504, 7-9-507. Section 7-9-504 provides that every aspect of disposition of security for a loan upon foreclosure "must be commercially reasonable", and § 7-9-507 provides a cause of action "*** to recover from the secured party any loss caused by a failure to comply with ***" § 7-9-504. Evidence of the participation of Herbert, Orange and O.S.I., Inc., was offered in the federal trial as tending to show a conspiracy by the Bank with those parties to take advantage of the Parsons. This conspiracy could and should have been pleaded in the federal proceeding by the Plaintiffs.

Paragraph 40 of the federal complaint and Paragraph 38 of the State complaint indicate that damages claimed to have been caused by the alleged wrongs in each suit are substantially the same. It would, therefore, appear that, in the words of *Woods,* supra, "recovery in the federal suit [would] have compensated plaintiffs for the total harm suffered," and "plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings." As shown in *United Mine Workers v. Gibbs,* 383 U.S. 715, a federal court has power to hear State claims if it has subject matter jurisdiction of the federal claim and if the State claims arise from "a common nucleus of supportive fact" so that plaintiff would ordinarily be expected to try them in one proceeding. The doctrine of pendent jurisdiction afforded Parsons an opportunity for that joinder. Instead, they chose to split the alleged srongs with the apparent scheme of relitigating the matter in the event of an adverse decision in the first court.

The United States Court of Appeals for the Fifth Circuit, as recently as April 1, 1983, set out the law applicable also to this Circuit, absent showing to the contrary, in the case of *Nilsen v. The City of Moss Point, Miss.,* 701 F.2d 556, at 560, as follows:

> "And it is equally settled that one who has choice of more than one remedy for a given wrong, *** may not assert them serially, in successive actions, but must advance all at once on pain of bar."

In *Nilsen* the plaintiff had filed suit under 42 U.S.C. § 1983 to recover in a sex discrimination suit for which relief had already been denied her in a suit claiming a parallel remedy under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. Relief under § 2000e had been denied the plaintiff because suit under that section was barred by the statute of limitations. The Court reasoned that the decision was on the merits and that the plaintiff was barred from proceeding in the second suit because of her unexplained dilatoriness in not pleading in the same proceeding all causes of action arising from the same set of facts.

Mr. and Mrs. Parsons and Parsons Steel, Inc., were parties to the federal proceeding against the Bank. The complaint was that the Bank acted through its Vice-President, Edward Herbert. Herbert was in privity with the Bank, and his wrong, if any, should have been charged in the federal court proceeding. It, therefore, appears that the Plaintiffs in the federal suit - Mr. and Mrs. Parsons and Parsons Steel, Inc. - should have been barred from maintaining the suit in the Circuit Court of Montgomery County, Alabama, upon issuance of the judgment of this Court in the suit filed by them against the First Alabama Bank and Mr. Herbert.

However, a fourth plaintiff, A. Pope Gordon, Trustee of the Bankrupt Corporation Parsons Steel Industries (Parsons Montgomery), was not a party to the federal court proceedings and may not be barred by the doctrine of res judicata unless Mr. Gordon, as Trustee, was privy to the parties in the original proceeding. This Court notes from depositions in the file of this Court, of which this Court may take judicial knowledge, that Trustee Gordon was represented by attorneys who participated in the taking of depositions which contained stipulations that the depositions could be used in both the State and federal

cases. See the deposition of Hon. Luther H. Waller, Jr., taken on January 28, 1980. Mr. Waller's deposition shows that the attorney for Trustee Gordon actually participated in the deposition, and Trustee Gordon could hardly argue that he did not have notice of the federal court proceeding under such circumstances. The United States Court of Appeals for the Seventh Circuit, in discussing the inter-relationship between 28 U.S.C. § 2283 (the Anti-Injunction Act), the doctrine of res judicata and the doctrine of collateral estoppel, makes the following statement:

> "The 'effectuate its judgments' exception was added in 1948 to permit a federal court to enjoin relitigation in a state court of a matter determined by a judgment of the federal court, thus abrogating *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941). 28 U.S.C.A. § 2283, Revisor's Note; 1A, Part 2 J. Moore, *Federal Practice* ¶ 0.208[2]-[3] (2d ed. 1974); *Doe v. Ceci,* 517 F.2d 1203, 1207 (7th Cir. 1975). As Justice Reed said in his *Toucey* dissent, the alternative to allowing such injunctions "is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication.' 314 U.S. at 144, 62 S.Ct. 149.
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> "The relitigation exception of § 2283 applies not only when the prior federal judgment is *res judicata* but also when the doctrine of collateral estoppel, or issue preclusion, is relied upon. *International Association of Machinists v. Nix,* 512 F.2d 125, 132 (5th Cir. 1975). We have even applied it to preclude an ancillary claim that could have been, but was not, asserted in the federal action, *Lee v. Terminal Transport Co.*, 282 F.2d 805, 807

(7th Cir. 1960), *cert. denied,* 365 U.S. 828, 81 S.Ct. 713, 5 L.Ed.2d 705 (1961), ***." *Samuel C. Ennis & Co. v. Woodmar Realty Co.,* 542 F.2d 45, 49 (7th Cir. 1976).

The *Ennis* case overruled the denial of an injunction by a district judge. The Appellate Court held that a trustee in bankruptcy and various other participants in a bankruptcy proceeding were entitled to federal injunctive relief against State action to preclude relitigation of issues decided in their favor by the Bankruptcy Court, as were individuals who, though not parties to the bankruptcy, were either attorneys for parties or did business with the bankrupt estate by buying real estate or arranging sales, as such parties were entitled to assert collateral estoppel, or issue preclusion, as to issues sought to be relitigated in the State action.

> "[T]he bankrupt, Woodmar Realty Company, an appellee here, was represented by Attorney Owen W. Crumpacker, the other appellee here. More than five years after the termination of the proceeding (in bankruptcy), Woodmar, represented by the same attorney, filed a damage suit in an Indiana state court charging the trustee in bankruptcy and various other participants in the bankruptcy court. The defendants in that action, after first moving to dismiss it, filed this federal action against appellees seeking to enjoin the state action. The District Court dismissed this action on the ground that 28 U.S.C. § 2283 forbids the relief sought." (parenthetical expression added). *Ennis,* supra, at 46-47. The Court of Appeals reversed the District Court.

Ennis incidentally rejected the principle of waiver or estoppel of the right to assert the defense of res judicata because of a delay of one year in asserting the same after bringing of the State Court action under circumstances similar to these. In *Ultracashmere House, Ltd. v. Meyer,* 664 F.2d 1176 (1981), a case heavily relied upon by the Parsons to defeat an injunction,

the Court of Appeals affirmed Judge Hobbs' denial of a stay of State Court proceedings, 88 F.R.D. 359. That case accurately states the law[2] pertinent to this type of case, but the facts and the result vary considerably from this case. The District Court recognized that the nonresident (1) had a right, and declined, to remove the litigation to federal court when it was first filed, (2) disregarded the trial court's order, and (3) suffered adverse determination of all issues except the amount of damages before seeking a haven in federal court. Here, the Parsons suffered a federal court judgment before the State court trial. The Defendant in that State court, having by-passed federal removal but having found State court distasteful, sought by injunction to obtain the effective removal so as to relitigate the liability found against it in the State court. To have allowed such relief to Plaintiffs in that case would, in effect, have defeated the purpose of the doctrine of res judicata and would have encouraged every non-resident to sample the climate of State litigation before deciding whether or not to seek a federal hearing. The trial judge assumed, arguendo, that he had discretion to grant the stay but declined to exercise the discretion to relitigate issues decided in the State court. In the instant case, the State court failed to show the same comity to this Court.

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[2] "Where a federal court is asked to interfere with pending state court proceedings, it must proceed with caution, taking into account general considerations of federalism and, in particular, likelihood of seriously disrupting the legitimate functioning of the judicial system of state." *Ultracashmere House, Ltd. v. Meyer,* 664 F.2d 1176, 1177.

"*** res judicata precludes relitigation of an action where four 'essential elements' are satisfied: (1) a prior judgment has been rendered by a court of competent jurisdiction; (2) there is substantial identity of the parties in the two suits; (3) there is identity of issues in the two suits; and (4) the prior judgment was rendered on the merits. *Ozley v. Guthrie,* 372 So.2d 860, 861 (Ala. 1979) (citing *Wheeler v. First Alabama Bank of Birmingham,* 364 So.2d 1190 (Ala. 1978)). 'Where these elements are present ... the former judgment is an absolute bar to any subsequent suit on the same cause of action, including any issue which was or could have been litigated in the prior action.' *Ozley,* supra, at 861 (citing *McGruder v. B & L Construction Co.,* 331 So.2d 257 (Ala. 1976)).***." *Ultracashmere,* supra, at 1183-84.

An argument by another trustee in bankruptcy, that he was not a party to a federal action and, therefore, should not be barred from bringing a State court action by the principles of res judicata and collateral estoppel, was rejected by a bankruptcy court. *In re Four Corners Enterprises,* 17 B.R. 156 (M.D. Tenn. 1982). In *Four Corners,* creditors and former majority shareholders of the debtor corporation to recover on a promissory note. The defense in the federal court was that the note was an obligation of the corporation only and not of the sole shareholder thereof. The plaintiffs in *Four Corners* countered by contending that the stockholder was personally liable because he had operated the corporation as its alter ego. The court found against the plaintiffs and dismissed the case. Subsequently, the trustee of the debtor corporation brought an action against the sole stock holder to charge him personally liable for the corporate debts. The court held that this attempt at religitation was barred under the doctrine of collateral estoppel, by the prior litigation of the former stockholders of the debtor corporation, stating the following:

> "The trustee was well aware of these proceedings (the prior federal action) and made no effort to intervene as an interested party. The trustee's inaction inveighs against now allowing him to relitigate the same issue previously decided in the federal district court proceeding. [citations omitted] Furthermore, the trustee has employed as attorney to pursue this action the same attorney who represented the Fields in their suit against the defendant in federal district court. Under these circumstances, the trustee cannot complain that he lacked a full and fair opportunity to litigate the issue in question at the federal district court proceeding. Collateral estoppel thus precludes the trustee from relitigating this issue." *Four Corners,* supra, at 160. (parenthetical expression added).

The relative positions of the trustee and the bankrupt are discussed in *Paradise v. Vogtlandische Maschinen-Fabrik,* 99 F.2d 53, 55 (3rd Cir. 1938), wherein the court said:

> "It is settled that a pending action will not abate merely because of the bankruptcy of the plaintiff. [citations omitted] In such a case the trustees in bankruptcy may either assume prosecution of the action with the court's approval, consent to its continued prosecution by the bankrupt for their benefit, or decline to prosecute it because it is likely to involve them in fruitless expense. [citations omitted] Furthermore if the suit is thus continued by the bankrupt the trustees will be concluded by the judgment. [citation omitted]."

A trustee in bankruptcy would also be precluded from relitigation by a judgment in a case wherein he should and could have been made a party to assert the trustee's rights but elected not to do so.

Parsons rely, for their contention that the Trustee could not have intervened in the federal proceeding, upon *Blake v. Pullen,* 554 F.2d 947, to the effect that permissive intervention under Rule 24 must be supported by independent jurisdictional grounds. The damages sought by Parsons against the Bank in the federal court specifically involved damages allegedly done to Mr. and Mrs. Parsons and their almost wholly-owned corporation (Parsons Mobile) allegedly as a proximate result of dealing between the Bank, acting through its Vice-President Herbert, and its debtor, Parsons Montgomery, acting through Mr. Parsons and, to some extent, Mrs. Parsons, who pledged some of the property of Parsons Mobile for security. Viewing the barebone, though complicated, pleadings in retrospect, this Court is now firmly of the opinion that Parsons Montgomery (more properly its Trustee in Bankruptcy) was the primary, if not sole, party damaged by the alleged violation of the Bank Holding Company Act. Parsons Mobile was primarily damaged by damage to its wholly-owned subsidiary, and Mr. and Mrs. Parsons, as controlling stockholders in Parsons Mobile, were damaged largely because of the bankruptcy of the subsidiary, Parsons Montgomery. This Court is firmly of the opinion that

any right of the creditors of Parsons Montgomery could have been asserted in the federal proceeding. The Trustee had the option to join in that suit or to await a judgment, if any, and assert the creditors' rights against the stockholders of the bankrupt corporation if they had been successful in the federal action. The Trustee, viewing both the federal and the State proceedings as a waste of effort, declined to join or did not consider joining in either. The Trustee was joined in the State court proceeding involuntarily on motion of the Bank. While the jury disagreed, the wisdom of the Trustee's reluctance to expend the creditors' money in processing these two complaints is understandable to this Court. Once the defects of the Bank Holding Company Act claim, obscured by barebone pleadings were clarified by the evidence, the failure of the federal claim was assured, even though the claim was vaguely substantial enough to give federal jurisdiction of State claims arising from the common nucleus of supporting facts. The decision not to subject the creditors to the expense of prosecuting the State claims arose from reasonable concerns: (1) the fraud claim arose from Parsons' claim that the Bank fraudulently promised him unlimited credit - one who has dealt with banks would doubt that a jury would believe that unlimited credit would be promised to anyone by any reputable banker; (2) the claim for sale of secured property at a commercially unreasonable price was hardly an enviable plaintiff's case when Parsons admitted the debt and had an opportunity to secure a better sales price; and (3) the claims for violation of fiduciary relationships, when both the Bank and Orange appeared to operate at arms-length in business relationships with the Parsons' entities in situations where everyone hoped to prosper, hardly appeared to offer great hope. This Court is of the opinion that the Trustee had reasonable cause to be unimpressed with the Parsons' chances of success.

This Court is of the opinion (1) that the State Circuit Court, in trying an identical set of facts to those previously tried in this Court, has disregarded, and is disregarding, the final judgment

of this Court over timely filed defenses of res judicata and collateral estoppel; (2) that, when those defenses were filed, the complicated pleadings obscured the similarity of proceeding and privy of parties from a State trial court unfamiliar with the prior litigation in this Court; and (3) that to allow a continuation of the State court proceedings in another State court would simply complicate the wrong. The public itself, as well as the parties, is interested in deterring relitigation of suits and no individual may waive the public interest. The Bank's reasons for relitigating in the State court before seeking relief from this Court can only be imagined, but Defendants did everything possible in the State court to demonstrate applicability of the doctrines of res judicata and collateral estoppel before returning to this Court. The pleadings were complicated, and the claims of the Plaintiffs were vague. This Court, having considered the same transactions, can understand the problem of proving without a trial those defenses to a court unfamiliar with the federal case. This Court is, therefore, of the opinion that neither waiver nor estoppel will bar Plaintiffs' bringing this suit to bar further relitigation of proceedings already decided in this Court.

Judgment with costs will be entered for the Plaintiffs, and the Defendants will be enjoined from further prosecution of the case entitled *Parsons Steel Industries, Inc., et al v. First Alabama Bank of Montgomery, N.A., et al,* Civil Action No. CV-79-179-G, in the Circuit Court of Montgomery County, Alabama.

DONE this 15th day of June, 1983.

United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83V-181-N

First Alabama Bank of Montgomery, N.A., et al.,
Plaintiffs,

vs.

Parsons Steel, Inc., et al.,
Defendants.

ORDER

(Filed March 29, 1985)

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the injunction heretofore issued by this Court in this cause should not be modified to allow the Trustee to pursue his UCC claim.

DONE this 29th day of March, 1985.

/s/ R.E. Varner
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83V-181-N

First Alabama Bank of Montgomery, N.A., et al.,
Plaintiffs,

vs.

Parsons Steel, Inc., et al.,
Defendants.

OPINION

(Filed March 29, 1985)

The history of this case is well stated by the Court of Appeals in *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242, [Parsons I], and in *First Alabama Bank v. Parsons Steel, Inc.,* 747 F.2d 1367 (11th Cir. 1984) [Parsons II]. The Court of Appeals in Parsons II remanded with instructions that this Court make fact-findings to determine whether the injunction should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale. That Court pointed out in guidance:

> "Assuming that the Trustee's UCC claim is based on factual allegations different from those underlying the fraud and BHCA claims, the parties' interests were not so closely aligned to say the Parsons virtually represented the Trustee as to this narrow claim that the Parsons did not raise in the federal action."

In response to the remand for clarification of the commercial unreasonableness claim, this Court ordered Trustee to specifically set out said claim. That claim will be considered and compared to the Parsons I claim hereinafter.

The Court of Appeals stated in Parsons II that, almost a year after this Court's judgment [referring to Parson I] in the

Bank's favor, "the Trustee amended his [State] complaint to include the UCC claim that the foreclosure sale was commercially unreasonable. Until that point in the litigation, the state action against the Bank was based on the factual allegations which had been fully adjudicated in the BHCA action. With the addition of the UCC claim, however, the state action began to involve fact questions which the district court found were part of the federal complaint, but which were not reached in the federal litigation" [Parsons II at 1379-1380]. The Court of Appeals held that the record on appeal was insufficient, however, to determine whether the UCC claim is based on the same factual allegations as was the fraud and the BHCA claims. As noted by the Court of Appeals [Parsons II, at p. 1379], the UCC claim in Parson II is based on commercial unreasonableness. Paragraph 27 of the complaint in Parsons I federal case concerned commercial unreasonableness.[1] This Court found against the Plaintiff on all aspects. Responsibility is on appellant to have a record showing the error. Nonetheless, the Appellate Court, in its remand, states the following:

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[1] Said Paragraph 27 of the Parsons I complaint contained this allegation: "The sale *** was not handled in a commercially reasonable manner ***." The pleaded reasons therefore related to the same facts from which the BHCA violation and the fraud allegations allegedly arose as stated in the complaint. Loose pleading requirements allowed Plaintiffs to state in a one-count or one-claim complaint allegations of a BHCA violation [Paragraph 34], a conspiracy [Paragraphs 25 and 29], a trust violation [Paragraph 26], a commercially unreasonable sale [Paragraph 27], lack of good faith, CODE OF ALABAMA [1975], § 7-1-201, and fraud [Paragraph 30]. It is difficult for this Court to understand the conclusion in the dissent, Parsons II, at p. 1382, as follows: "[A]s the majority correctly notes, the commerical reasonableness claims - the factual basis for which is unclear on the present record - were not pleaded at all in the federal action." The Trustee's attorney had access to these pleadings and participated in discovery. He was clearly privy to the commercial reasonableness claims. If they were treated as damages, he had every opportunity to have prayed that they be treated as a separate cause of action.

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court." Parsons II, supra, at 1380.

CURRENT UCC CLAIM. Whether or not the UCC claim alleges only that "improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets" can best be determined by examining the Trustee's Claims filed herein February 21, 1985, in response to this Court's Order entered February 6, 1985, directing that the Trustee state with particularity his UCC claims.

CURRENT CLAIMS OF TRUSTEE. Guided by the Order of the Court of Appeals that res judicata would bar no part of the Trustee's UCC Claims "separate and apart from any of the events leading up to the sale" [Parsons II, supra, at p. 1380], the Trustee's attorney sought to direct his claims to some impropriety occurring after the sale, complaining of a "commercially unreasonalbe sale and wrongful disposition of the assets of Parsons Steel Industries, Inc. *** after a foreclosure in January of 1979," in violation of CODE OF ALABAMA [1975], §§ 7-9-504, 7-9-507 and 7-1-201. Sections 7-9-504 and 7-9-507 deal with a commercially unreasonable sale, and Section 7-1-201 deals with the duty of good faith.[2]

More specifically, the Trustee contends in his response to this Court's Order directing specificity the following: (1) that the sale was a private sale of the securities two days after repossession; (2) that only one potential buyer was notified of the sale; (3) that the buyer had no pre-sale experience in the steel business; (4) that no contact was made with any person in the

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[2] It is noted that Paragraphs 27 and 30 of the complaint in Parsons I contained allegations of a commercially-unreasonable sale and a lack of good faith, respectively.

steel business or with any unsecured creditor; (5) that no notice was given the attorney for Parsons Steel Industries, Inc.; (6) that no notice was placed in any steel interests or public publications; (7) that no one except seller and purchaser were in attendance at the sale; (8) that the sale was at a private place; (9) that only one bid was offered and accepted; (10) that the price paid at the sale was determined in accordance with the amount necessary to satisfy the Bank's secured debt; and, finally, (11) that the sales price was $907,252.85 while the value of the collateral was in excess of $2,500,000.00.

It appears to this Court and this Court finds that each of these items of the current contentions of the Trustee was part of the original claims made in this Court and litigated in the suit by Parsons Steel, Inc., and affirmed by the Court of Appeals in Parsons I, supra.

In Paragraph 14 of the complaint [Parsons I], Plaintiffs alleged that on November 30, 1978, a balance sheet of Parsons Steel Industries, Inc., showed assets of $2,384,945.89 and liabilities of $1,910,747.09. Plaintiffs alleged in Paragraph 16 of the plaint that conditions were substantially the same on January 17, 1979. Paragraph 24 of the complaint contained allegations that on January 17, 1979, a private sale of the assets of Parsons Steel Industries, Inc., was held at 10:00 a.m., rather than at the announced time of 2:00 p.m., to OSI, Inc., for $907,252.85. Paragraph 25 of the complaint contained allegations that the agent of the Bank and Mr. Orange for OSI, Inc., worked in concert so as to obtain properties of Parsons Steel Industries, Inc., for Orange. Paragraph 26 of the complaint contained allegation suggesting a violation of a resulting trust. Paragraph 27 of the complaint contained allegations that the sale was "not handled in a commercially-reasonable manner in that the acquisition and sale were completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets purported to be sold;" that no additional possible purchasers were given any opportunity to in-

spect the properties and submit bids; that the sale was not handled in conformity with reasonable commercial practices; and that the assets sold for other than the fair market value thereof. Paragraph 29 of the complaint contained allegations that the Bank, Orange and other were guilty of "collusion *** to do great damage and economic harm to the Plaintiffs and which effectively put ***" Parsons Steel Industries, Inc., out of business. Paragraph 30 of the complaint contained allegations of lack of good faith and fraud with intent to deceive and injure the Plaintiffs and the creditors of Parsons Steel Industries, Inc. Paragraph 32 of the complaint contained allegations of the January 17, 1979, private sale to OSI, Inc., a newly formed corporation, resulting in Plaintiffs' loss of an on-going business together with its assets, leaving unsecured debtors owed $847,000.00. Paragraph 34 of the complaint contained allegations of a violation of the Bank Holding Company Act. Paragraph 37 of the complaint contained allegations that Parsons Steel Industries, Inc., had been placed in involuntary bankruptcy. The trustee in Bankruptcy and his attorney participated in discovery proceedings in Parsons I and, obviously, had access to the complaint which contained the above allegations when he elected not to pursue any remedy on the Trustee's part or on behalf of the creditors.

Another indication that the State claims relate to alleged presale activity can best be determined by the way that the Trustee's attorney processes them in the State court proceeding. In his opening statement, Mr. Wood adopted Mr. Beasley's statement, saying specifically the unsecured creditors "*** had no notice of any foreclosure sale" and that "the Bank obtained from Michael Orange enough to satisfy the Bank's debt but not any more ***." [R. 61-62]. In his closing argument, Mr. Wood stated, "We are entitled to recover on commercial reasonableness—on fraud and conspiracy." [R. 1573]. Mr. Wood, further referring to the pre-sale failure to obtain purchasers and to determine the value of inventory, said that the

Bank "didn't try to find out. Just figured out what the Bank was owed. Same answers on all the other assets of Parsons Steel." [R. 1573]. Mr. Wood stated that "*** Parsons Steel Montgomery is entitled to recover *** on the commercial reasonableness *** of the sale ***. It was *all pre-arranged.* *** It was done in hidden fashion. *** You've got a corporation that was formed especially for it" (emphasis added). [R. 1575]. Mr. Wood spoke of the Bank's wanting to avoid a Chapter 11 proceeding because it would have been more difficult. He spoke of the fact that the time of the sale was changed from "ten to two" because they did not want anyone else there because they "*** were going to sell to Michael Orange," that "they made that decision way back on the tenth or eleventh." [R. 1576]. Referring to the same pre-sale activity, Mr. Wood stated: "Some how, some way in December, they decided to do it differently." [R. 1578].

Trustee's attorney at the State trial complained (1) of plans made before the sale, (2) of fraudulent plans before the sale, (3) of insufficient notice before the sale, (4) of changing before the sale of the time of the sale, (5) of plans to sell to Orange made before the sale, (6) of plans to sell for the amount owed the Bank before the sale, (7) of avoidance of a Chapter 11 proceeding before the sale, (8) of failure before the sale to determine what the inventory was worth, (9) of failure before the sale to determine what other assets were worth and, finally, (10) of the "pre-arranged" lack of "commercial reasonableness of the sale."

Every word of the Trustee's attorney's statements during the State Court trial was devoted to pre-sale activities of Michael Orange and the Bank's agent Herbert. No suggestion was made that the Defendants in the State court case did anything wrong after the sale. The only substantial change in the Trustee's position is that the Trustee's attorney, guided now by the admonition of the Court of Appeals, alleged, as a preamble to allegations of pre-sale activities, that the Bank "conducted a commer-

cially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc., ***" after a foreclosure in January, 1979.

The Court of Appeals stated that, because the questions of liability and damages were bifurcated, evidence of an insufficient price as bearing on commercial reasonableness was never presented to the jury in the federal court trial. The parties to that proceeding and the Trustee had access to the pleadings and participated in a number of the discovery proceedings. They understood that commercial reasonableness of the sale was an issue in the case, whether as damages for the Bank Holding Company Act violation or as an independent claim as now asserted, and the Trustee had every opportunity to litigate commercial reasonableness either as a part of the Bank Holding Company Act or as a part of an independent claim for commercial reasonableness at his option. If the alleged value of the assets as compared to the sales price were not litigated in the trial proceeding in this Court, it was because the parties did not present it to this Court as an issue independent of the Bank Holding Company Act violation. The Trustee knowingly declined to participate. His failure to do so, whether by design (so as to obtain two bites at the apple) or by inadvertence, bars his doing so now under the doctrine of res judicata.

The Trustee's contention that the sales price was unreasonable derives from Plaintiff's claim in Parsons I that the whole thing was planned prior to the sale and that the Bank's agent and Michael Orange, the purchaser, knew and arranged prior to the sale that the sales price would be the amount of the debt to the Bank. Note 11 of the Opinion of the Court of Appeals in Parsons II, supra, at 1373-1374, reads as follows:

> "The record in this appeal does not indicate what precise facts the UCC claim is based on. That is, it is unclear whether the claim is based on allegations that something about the handling of the actual sale was commercially

> unreasonable and resulted in an insufficient price or whether the UCC claim is based solely on allegations that improprieties involving the Bank and Orange prior to the sale resulted in an unfairly low price."

This Court concludes that the Court of Appeals' Opinion means that, if nothing wrongful happened at the time of the actual sale and the improprieties complained of involved allegations of wrongs by the Bank and Orange prior to the sale resulting in an unfairly low price, then Parsons and all those associated with him, including the Trustee, are barred from further pursuit of this proceeding. Clearly, in the mind of the Court the things that the Trustee still argues were wrongful occurred prior to the sale. While the Trustee insists that the sale itself was unreasonable and the disposition of the proceeds was wrong, he alleges no non-conclusory facts which would indicate that any wrong that was done at or after the sale was improper. His claims of impropriety relate to plans made by Herbert and Orange: failure to give public notice of the sale, failure to seek buyers to the sale, failure to hold the sale at the time previously planned and failure to learn the value of the property securing the debt - in short, failure to do those things prior to the sale which allegedly would have produced a fair price for the property sold. All of those matters have been litigated, and the Court of Appeals has affirmed a judgment for the defendant thereon. The Trustee, being in privy with the plaintiffs in that case, is bound by the proceeding.

This Court has been troubled by factors raised in the dissent in Parsons II beginning at 747 F.2d 1367. The dissenter takes the position that, while the original federal adjudication of this proceeding might have initially provided a res judicata bar to the State court proceeding, the determination by the State court that the federal court proceeding was not res judicata of the issues in the State court constituted a res judicata bar to the federal court's considering the matter. The Bank, realizing that the pleadings were not specific and initally having its own

doubts that all of the issues in the State court proceeding were barred by the doctrine of res judicata, found it necessary to proceed in the State court proceeding in order to determine that the issues in the State court proceeding were the same as that already concluded by this Court's judgment. That being true, the doctrine of res judicata could only be applied at such time as the issues in the State court proceeding were clearly identified and could be compared to the issues in Parsons I.

The dissenter argues that the Bank should have sought an injunction before the trial in the State court. In cases such as this where issues are not clear in either court, a special hearing would be required to determine precisely what the issues were in each proceeding. On occasion (and probably in this case) this could not have been fully determined until the trial on the issues. If this Court is to protect its jurisdiction, it must have the authority to do so at the point where invasion of jurisdiction becomes apparent. Piecemeal decisions thereon would be of little value.

This Court is of the opinion that the res judicata issue cannot be determined in some cases until the trial on the merits and that the Defendants in this case, by submitting to a trial on the merits including the plea of res judicata in the State case, cannot be held to a waiver of their rights to submit the res judicata issue to the court first having jurisdiction because the issue of waiver concerns itself with private rights as distinguished from public rights and the doctrine of res judicata has as its purpose the avoidance to the public, as well as the parties, of expenses of unnecessary litigation and the conservancy of judicial efforts. This Court is convinced that no private individual should be allowed in effect to waive the effect thereof.

This Court, therefore, finds that the injunction heretofore issued by this Court should not be modified to allow the Trustee to pursue his UCC claim because that claim is based on matters heretofore litigated by this Court and the Trustee was privy to such litigation.

An Order will be enacted in accordance vith this Opinion.

DONE this 29th day of March, 1985.

/s/ R.E. Varner
United States District Judge